No. 43. Ⅱ 1

Brief of Guthrie, Horton & Waggener for Appellants

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OCTOBER TERM, 1899.

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CHARLES M. COTTING and FRANCIS LEE HIGGINSON, *Appellants,*

vs.

A. A. GODARD, as Attorney-General of the State of Kansas, and the KANSAS CITY STOCK-YARDS COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF IN REPLY TO ARGUMENT OF ATTORNEY-GENERAL OF KANSAS.

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Of counsel for appellants.

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II. The nature of the questions presented (pp. 8-18).
III. The effect of the statute on the gross and net earnings of the stock-yards company (pp. 18-30).
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I.

THE JURISDICTION OF THE COURT.

The equitable relief sought by the bills of complaint was two-fold; first, as to the defendant company and its officers, and, secondly, as to the Attorney-General of Kansas.

Under the first head, the complainants, as stockholders of the defendant company, sought to enjoin its officers from complying with an unconstitutional statute which, it was alleged, deprived the company of its property without due process of law and denied to it the equal protection of the laws in violation of the Fourteenth Amendment. The controversy not only arose under the Constitution of the United States, but there was in addition a diversity

of citizenship and the fullest compliance with equity rule 94 (record, pp. 13–15, 19, 34–36, 39–40). The bills were in all respects within the doctrine of *Dodge* v. *Woolsey*, 18 How. 331, 341; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 553, and *Smyth* v. *Ames*, 169 U. S. 466, 517. After all the testimony had been taken in the course of an unusually fierce adversary litigation, Attorney-General Boyle felt justified in expressly admitting of record that there was no collusion in the suit as between the complainants and the defendant company or its officers (pp. 874, 875). The suits, therefore, as to the defendants other than the Attorney-General, were indisputably within the jurisdiction of the court below; and, as all the issues on the merits have been thoroughly litigated and contested in every aspect, there can be no suggestion that the ends of justice will not be served by exercising the equitable jurisdiction in such a case. It affords an investigation of the merits of such a controversy in the only adequate form. Mr. Justice Miller said in *Chicago, &c., Railway Co.* v. *Minnesota*, 134 U. S. 418, 460:

> "6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.
>
> "7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

It is true that decrees *pro confesso* were entered against the defendant company and its officers, but this could not

deprive the complainants of relief below or here. If they had been the only defendants and the litigation had rested there, an injunction would, of course, have issued against them, and there would have been no appeal to this court. However, the court entered a decree dismissing the bills on the merits, and this necessarily vacated the decrees *pro confesso*, and left the case as to all the defendants with a decree dismissing the suits on the merits. *Frow* v. *De La Vega*, 15 Wall. 552, 554; *Hohorst* v. *Hamburg-American Packet Co.*, 148 U.S. 262, 265; *Kopper* v. *Dyer*, 59 Vt. 477, 489. The appeal was taken in open court as to all the defendants; there was no severance; and all the defendants have appeared in this court.

Under the second head, which involves the question of the jurisdiction of a federal court to enjoin a state officer from enforcing an unconstitutional statute when such enforcement would obviously interfere with and destroy the property rights of the citizen, it is submitted that the case is within the settled doctrine of this court, as reiterated in *Smyth* v. *Ames*, 169 U. S. 466, 518, which was a case very similar to the case at bar, brought by a stockholder seeking among other things to enjoin the attorney-general of a state.

The act of March 3, 1897, involved in this controversy, expressly charges the Attorney-General, section 8, with the enforcement of the act, and obviously its enforcement will involve the defendant company and its stockholders in a ruinous multiplicity of suits, for there would be thousands of violations of the law each day, and the penalties incurred would be fabulous.

The Attorney-General relies, however, upon the case of *Fitts* v. *McGhee*, 172 U. S. 516, and apparently upon the idea that this decision practically overruled the cases

from *Reagan* v. *Farmers' Loan & Trust Co.* to *Smyth* v. *Ames.* This is an erroneous view, for Mr. Justice Harlan, in delivering the opinion of the court in *Fitts* v. *McGhee*, 172 U. S. at p. 529, carefully stated:

> "It is to be observed that neither the Attorney General of Alabama nor the Solicitor of the Eleventh Judicial Circuit of the State appear to have been charged by law with any special duty in connection with the act of February 9, 1895. In support of the contention that the present suit is not one against the State, reference was made by counsel to several cases, among which were *Poindexter* v. *Greenhow*, 114 U. S. 270; *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S. 311; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *In re Tyler*, 149 U. S. 164; *Reagan* v. *Farmers' Loan and Trust Co.* 154 U. S. 362, 388; *Scott* v. *Donald*, 165 U. S. 58, and *Smyth* v. *Ames*, 169 U. S. 466. Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights.

In *Smyth* v. *Ames* Mr. Justice Harlan, among other things, said (169 U. S. at pp. 518, 519):

> "It would therefore be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the Circuit Court has jurisdiction not only upon the ground of the diverse citizenship or alienage of the parties, but upon the further ground that, as the statute of Nebraska under which the State Board of Transportation proceeds is assailed as being repugnant to rights secured to the plaintiffs by the Constitution of the United States, the cases may be regarded as arising under that instrument. But to prevent misapprehension, we add that, within the meaning of the Eleventh Amendment of the Constitution, the suits are not against the State but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of

that Amendment. *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *In re Tyler*, 149 U. S. 164, 190; *Scott* v. *Donald*, 165 U. S. 58, 68; *Tindal* v. *Wesley*, 167 U. S. 204, 220."

The language of Mr. Justice Brewer in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390, seems also precisely in point. That suit was brought against the individuals composing the state railroad commission, the attorney-general of the state, and the railroad company whose rates were affected by the legislation drawn in question. Mr. Justice Brewer said:

"Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the State, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of state officers under a constitutional statute is not subject to challenge in the Federal court. We are unable to yield our assent to this argument. So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and Federal, is in restraining the collection of taxes, illegal in whole or in part."

The question of jurisdiction was not discussed in the principal brief because it was assumed that the Attorney-

General of Kansas, representing the public using the yards, desired a speedy determination upon the merits, and recognized the essential propriety of this form of procedure instead of the harassment and vexation of innumerable suits and arrests.

Although the point of jurisdiction was made below on the original application for a preliminary injunction, yet, as Foster, D. J., then said (*Cotting* v. *Kansas City Stock-yards Co.*, 79 Fed. Rep., 679, 681):

> "There has been some discussion about the jurisdiction of this court, *but it is not seriously challenged;* and the objection by the attorney general that he is improperly made a party defendant is not well taken, as the court has jurisdiction to enjoin a state officer from enforcing an unconstitutional law. *Reagan* v. *Trust Co.*, 154 U. S. 388, 14 Sup. Ct. 1047."

It is to be regretted that Attorney-General Boyle, if he intended to insist upon the point of jurisdiction under the Eleventh Amendment, did not raise that defense in the ordinary form of a plea or demurrer, and have the question promptly certified to this court. If the decision had then been adverse, the complainants could have proceeded in a state court, and great labor, expense and delay would have been avoided.

It is, therefore, deemed pertinent to inquire whether it may not be reasonably said that Attorney-General Boyle, in view of the full investigation and adversary contest upon the merits conducted by him below, has waived the question of jurisdiction under the Eleventh Amendment. In *Clark* v. *Barnard*, 108 U. S. 436, it was held that a state may waive its constitutional immunity from suit by voluntary appearance and submission to jurisdiction.

The bill of complaint in the *Cotting* suit was filed March 13, 1897 (p. 20), and in the *Higginson* suit March 26, 1897 (p. 42). Thereupon, on April 3, Attorney-General

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Boyle filed in each suit certain "objections to the bill of complaint," in none of which objections was there any mention of the Eleventh Amendment. Subsequently, and on April 5, Attorney-General Boyle filed a general appearance in each suit, in which he stated as follows:

> "Now comes the defendant, L. C. Boyle, Attorney-General of Kansas, and enters his appearance in the suit, and to the complainant's bill of complaint therein."

Thereafter, and on June 21, 1897, the Attorney-General filed a demurrer in which no mention whatever was made of the Eleventh Amendment; but, on the contrary, as the court will find in the third ground of demurrer, Attorney-General Boyle seemed to invite a suit against the State of Kansas, for he said:

> "And this defendant has no personal interest whatever in said controversy other than such as pertains to every citizen of the State of Kansas, *and said State of Kansas is not made a party to said bill.*"

Without desiring to urge any technicality, it does seem fair to say that, if Attorney-General Boyle had then intended to insist that the judicial power of the court did not extend to him because the suit against him was in effect a suit against the State of Kansas, he would have so pleaded. We can, therefore, quite understand the statement of Judge Foster that the jurisdiction was "not seriously challenged."

After the filing of this demurrer, the taking of testimony was proceeded with under an order of the court providing that a master should be appointed with power to take testimony and report the same with his findings (p. 52). Testimony was taken by both sides under this order, and the application for a preliminary injunction then argued. On this testimony, Foster, D. J., denied the application on October 4, 1897 (p. 874). Subsequently,

and on October 15th, the demurrer of the Attorney-General, which, to repeat, did not specifically set up the Eleventh Amendment, was overruled, and answers on the merits were filed by him in each suit on October 15 (pp. 877, 906, 907, 937), to which replications were duly filed by the complainants on the same day (pp. 937, 938). In the answers so filed, Attorney-General Boyle for the first time specifically pleaded the Eleventh Amendment; but the point was not pressed or argued, and for this reason it received no attention from Thayer, C. J., in the opinion dismissing the bills upon the merits.

In equity it is always the practice to plead jurisdiction at the proper time and before a defendant enters into his defense at large. This is obviously a necessary rule for the due and orderly administration of justice, and to prevent parties from taking chances upon the merits and then reserving for their benefit the point of jurisdiction which, would "overthrow protracted, extensive and costly proceedings carried on in reliance upon its consent. Surely no such imperfection attends the administration of a court of equity. Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant." Mr. Justice Brewer in *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530, 535.

It is, therefore, submitted that the jurisdiction of the court to hear and determine this controversy upon the merits is ample in both aspects of the issues framed by the bills of complaint.

II.

The nature of the questions presented.

Before re-examining the facts and points of law presented by the record, it will be interesting to observe that

the court is now called upon for the first time to adjudge what elements should be considered in determining the compensation that an owner of private property which has become impressed with a public interest is entitled to charge or receive for the use of his property, when such owner performs no public function and enjoys or exercises no special franchise from the state. In all the previous cases affecting any such private business, the controversy was as to the existence of the power to regulate, and in no way touched upon the reasonableness of the rates prescribed. *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391. Every case so far involving any inquiry as to the reasonableness of statutory rates affected public corporations, such as railroad, turnpike and water companies, which perform functions of the state and enjoy valuable franchises, and whose right to exact toll is derived expressly or impliedly from legislative grant. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Covington, &c., Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames* 169 U. S. 466; *San Diego Land Company* v. *National City*, 174 U. S. 739.

It is submitted by the appellants that there is a broad difference in this matter of regulation between the public or quasi public use of highways, waters, &c., and the use of private property by the public for its convenience and profit. The distinction is between what is essentially a public use and a use which is essentially private but in which the public has an interest for its convenience or profit. In the former case, the government may control because the use is primarily an instrumentality of the state, within the function of the government itself to establish, perform and maintain. In the latter case, the use is primarily private, although the

public has acquired an interest and has a right of interference, but only to the extent of its necessity or welfare.

In the case of private property so used by the public, a court of justice may fairly and justly recognize equities in favor of the owner which do not exist in the case of enterprises more or less public. The owner of such private property should be permitted to enjoy in fullest measure the legitimate fruits of his successful venture and labor, as long always as the charges he makes are customary and reasonable. So also the power of the legislature to interfere with private property ought not to be so extensive as in the case of property essentially public; nor ought the courts to indulge, as against the owner of private property, the same degree of presumption in upholding legislative interference as may rightly obtain when the rates of railroad, turnpike and other public corporations are being dealt with. This is a doctrine which should commend itself to the court as embodying a sound public policy and a just regard for the sacred rights of property. The appellants, therefore, urge that they are entitled to more consideration and to a larger measure of liberty of action and freedom of contract and also to a larger profit than they might be entitled to if their capital were invested in essentially public instrumentalities.

The power of a legislature to regulate or prescribe the tolls or charges of corporations performing public functions really finds its origin and sanction in the legislative grant itself. Without a statutory grant express or implied, no public corporation, such as a railroad, a turnpike, or a water company, could exact toll for the use of the public highway or the public waters. Such a toll is in

effect a common charge on the public. Its imposition and regulation are prerogatives of the government alone. These public corporations are created and their franchises granted primarily for the benefit of the public; they become and serve as instrumentalities of the state for the welfare of its people and the development of its resources; and they are essentially subject to the governmental power and duty of control, supervision and regulation. This control is fair and just, as well to the public as to the property owner; the charter grant always implies, if it does not recite, that the legislature has reserved the right to prescribe reasonable tolls and charges for the use of the public highways, public waters, &c., and this reservation is a part of the contract.

The cases which discuss the power of regulating the tolls and charges of railroad, turnpike and water companies emphasize the fact that the companies are performing public functions; that the right to exact tolls comes from the state; that there is an implied condition or reservation in the grant that the tolls shall be subject to legislative regulation, and, *e. g.*, that "it is as vital that the State should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation." *Covington, &c., Turnpike Co.* v. *Sandford*, 164 U. S. 578, 587, 594. See, also, *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 393; *Smyth* v. *Ames*, 169 U. S. 466, 544; *Olcott* v. *Banfill*, 4 N. H. 537, 545; *Boston and Lowell Railroad Corporation* v. *Salem and Lowell Railroad Co.*, 2 Gray 1, 29; *Camden and Amboy R. R. Co.* v. *Briggs*, 22 N. J. Law 623, 657; *Erie & North-East Railroad Company* v. *Casey*, 26 Pa. St. 287, 307. Even then the true scope of the power is "to prevent extortion or undue charges." *Lake Shore, &c. Railway*

Co. v. *Smith*, 173 U. S. 684, 699. It follows that, in the case of these public corporations, which possess the great power of eminent domain and perform functions that the state itself might perform, the governmental authority to regulate tolls rests upon the implied condition or reservation to which we have adverted. When the legislature does exercise this reserved power, the courts may well hold that only in the case of clearest abuse ought the judicial branch to interfere, because such reservation is part of the contract of incorporation and part of the consideration upon which valuable franchises and privileges have been granted and accepted.

But no such consideration exists in the case of individuals and private corporations which exercise no power of eminent domain and perform no public functions. The authority of the legislature to regulate their charges does not spring from any grant or implied condition or contract, but is derived solely from and is to be upheld only by what is termed the police power. The underlying principle supporting the exercise of this police power is that it is the duty of the state to protect the public from extortion by those whose property is so situated or whose business has become so important that the public is to a greater or less extent constrained to deal with them. The conduct of the business becomes a matter of public concern and interest to the extent, and only to the extent, that the legislature may interfere to prevent the exaction of unreasonable and arbitrary charges. Then, as in the case of a railroad company, "the government within whose limits it conducts its business, may by legislation protect the people against unreasonable charges for the services rendered by it." [1] In other words,

[1] Mr. Justice Harlan in *Smyth* v. *Ames*, 169 U. S. 466, 545.

the scope and limit of the power is to prevent extortion; and so long as the charges of the owner of such private property are not undue or extortionate, the legislature cannot interfere.

The doctrine of *Munn* v. *Illinois*, 94 U. S. 113, ought not to be so extended as to place private businesses and property in exactly the same category as railroads or other public instrumentalities, for the ground and scope of the authority to interfere and regulate are not at all the same in both cases. The court below undoubtedly conceived that the rule in this case was stricter than it should be, and held in effect that, though the statutory rates might seem unreasonable according to the ordinary tests of reasonableness, yet, unless they were *confiscatory*, relief should be denied. Thus, in dismissing the bills of complaint, Thayer, C. J. said (82 Fed. Rep. at p. 856; record, p. 945):

> "Conceding, as we must, that the legislation complained of was radical in its nature and effect, that it reduced the company's income about fifty per cent., *and that it prevents it from realizing on the capital invested in its plant such a per cent. as is ordinarily realized on capital invested in other mercantile and business enterprises*, still the court is not prepared to hold that the statute is *confiscatory*, and that it deprives the company of its property without due process of law."

It cannot be doubted that, if the court below had appreciated that the true rule is not so stringent as to deny the citizen relief unless the legislation is confiscation, and that upon this question of reasonableness a court should "apply justice as it is understood of men, and, in its clear light,"[1] determine the controversy, the result would have been different. The decision would have been that the customary rates charged by the stock-yards company were, according to all ordinary rules of justice, reasonable and just.

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[1] McKenna, C. J. in *Southern Pac. Co.* v. *Board of Railroad Com'rs*, 78 Fed. Rep. 236, 261

The Kansas City Stock-Yards Company has no special franchise, no privilege, no monopoly of any kind. It is engaged in an intensely competitive business. Even in Kansas City, competitive yards may be started alongside at any time. It has no practical monopoly from its situation. This fact was virtually conceded, for the contention of the Attorney-General below, throughout the taking of the testimony, seemed to be that other and cheaper lands were available for stock-yards purposes. The establishment of other stock-yards in the vicinity might ruin the business. The removal of the packing plants adjoining its premises would at once destroy the market and deprive it of half its custom. The stock-yards company exercises no power of eminent domain; and must pay for the property it uses whatever price the private owner exacts. The proof shows that it was compelled to pay more for much of its property than if it had been able to exercise the power to condemn. To use the expression of some of the witnesses, the absence of the power of eminent domain enabled property owners, in certain instances, to "hold up" the company in the purchase of necessary land (pp. 206, 234, 308, 494, 551), and in fact compelled it to pay much more than the master allowed in many instances as the value of the property.[1] Its stockholders hazarded their capital upon a doubtful and uncertain industrial

[1] Indeed, this feature, which in all fairness should have created an equity in favor of the stock-yards company, and should have emphasized the reason why it ought not to be subject to legislative control to the same extent as a corporation exercising the great power and advantage of eminent domain, and should be allowed more than the bare market value of the lands, was turned against it and pressed as a reason why the price paid by it should not be considered. Thus, lands that actually cost over $60,000 an acre were reported by the master as worth only $45,000, and 22.858 acres which were purchased in 1895 at an actual cost of $1,289,239.73, or an average of $56,401.72 per acre, were likewise reported as worth only $45,000 per acre, although it appeared that the stock-yards company was even then unsuccessfully endeavoring to purchase adjoining property at $70,000 an acre.

speculation (pp. 354, 442, 458, 459). They have succeeded solely through the energy and capacity of the managers and the investment and risk of a large capital. The venture has turned out very successful; the owners of the stock-yards have built up a business and market which are now more than thirty times what they were in 1871; and their efforts have resulted in creating a valuable and remunerative business (pp. 347, 451), profitable indeed to the owners of the stock-yards, but immeasurably beneficial to the State of Kansas and to Kansas City. They have created a great market where previously there was nothing but a feeding yard. The real property, which was mostly bought in 1871 to 1879, and was then wild land, has vastly increased in value during the period of from twenty to twenty-seven years; and the owners are entitled to the full benefit of that increase. It is equitable that such a concern, whether owned by an individual or a private corporation, shall be allowed to reap the fair profit of the industry and sagacity of its managers and the risk of its capital. It would be just for a court in such a case to recognize equities which might not obtain with a railroad or turnpike or water company's property. It would be a sound and wise rule to declare that such a private owner shall be less subject to legislative interference and regulation than the public corporation above described, which enjoys valuable franchises and privileges at the expense of the public and to the detriment of the liberty of others. Will not a court of equity, in determining value, allow to such an owner something more than the bare value of the naked land and of the materials used in the structures? Would not the basis of actual cost of present reproduction be obviously an unfair valuation as between man and man? Does it

become a justifiable basis of valuation, with its clear element of spoliation and destruction of values, merely because the legislature sees fit to interfere for the benefit of the class using the market?

The court is also called upon in the case at bar to decide for the first time whether the doctrine of *Munn* v. *Illinois* shall be extended so that a legislature may, in the case of any business impressed with a public interest, regulate the charges of large dealers, and leave small dealers in exactly the same business free from regulation. In *Munn* v. *Illinois*, *Budd* v. *New York* and *Brass* v. *Stoeser*, the regulation applied to all alike in the same locality, whether owners of large or small warehouses or elevators, and there was absolutely no discrimination because of the extent of the business done or the amount of the property owned. In the case at bar, all small yards are not affected. The testimony shows that there is at least one other stock-yards in Kansas, namely, at Wichita, and for all that appears, there are numerous feeding stations and cattle stables all over the state. The legislature, of course, had some purpose and some object in wording its enactment so as to exempt and free from its operation all small yards. The Attorney-General now contends that, for all that appears, the Kansas City stock-yards is the only stock-yards in the state. If that had been the fact, the legislature would never have worded its enactment in the peculiar way it did, and the Attorney-General would have shown the fact. But it is not the fact. On its face, this act exempts small yards and dealers in feed. And it is submitted that "it is a pure, bald and unmixed power of discrimination in favor of"[1] those persons who are engaged in a similar

[1] *Lake Shore, &c., Railway Co.* v. *Smith*, 173 U. S. 684, 698.

business of yarding and feeding cattle to a smaller extent than at the Kansas City yards.

If a business becomes impressed with a public interest, and it be found that the common law requirement of reasonable charges is insufficient to protect the public and legislation is necessary, then the only safe rule, in case the legislature does interfere to regulate, is that the regulation shall be by general law, applicable to all alike—owners of large or small business plants, rich or poor.

Although this is the first case presenting the question as to the elements to be considered in determining the reasonableness of charges in the case of private concerns, nevertheless the labor and study of the court in previous cases have resulted in the elucidation of a fundamental principle of justice which will guide to the truth in all these discussions. The appellants invoke the protection of that principle. The principle is that the owner of property is entitled to reasonable compensation for the service rendered to the public and to a just return upon the fair present value of the property used by the public, and that the legislature in fixing or regulating charges must do so with reference to what is just and reasonable under all the circumstances—just to the property owner as well as to the public. In applying this principle, the basis of calculation in most cases will be either the value in itself of the service rendered or the fair present value of the property used for the convenience of the public, or both together, and frequently such other equities will be considered as may justly and rightly be given weight in each case. Therefore, if there are equities in respect of industrial enterprises which do not exist in respect of, *e. g.*, railroads, the court will give

the property owner the benefit of those equities. It is also now established that, if less than a reasonable rate be prescribed by a legislature, the constitutional rights of the property owner are illegally encroached upon; and that, if he challenges the justice or reasonableness of the attempted regulation, he is entitled, as matter of unqualified constitutional right, "to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy."[1] In the light of these principles, we may proceed to the consideration of the particular features presented in the present controversy.

III.

The effect of the statute on the gross and net earnings of the stock-yards company.

The first inquiry that logically presents itself is as to the effect of the legislation upon the company's net earnings under the customary charges. If it be established that the reduction is radical, the next inquiry must be as to whether or not such a reduction from the customary charges is fair, just and reasonable. The customary rates before the legislation in question were 25 cents per head of cattle, 10 cents for calves, 8 cents for hogs, and 5 cents for sheep (p. 64). The statute reduced these charges to 15 cents for cattle, 8 cents for calves, 6 cents for hogs and 4 cents for sheep, that is to say, from twenty to forty per cent.

As will be shown hereafter in the discussion of the reasonableness of the customary charge and the value of the service rendered, the Kansas City Stock-Yards Company has for many years made the same charge for yard-

[1] Mr. Justice Blatchford in *Chicago &c., Railway Co.* v. *Minnesota*, 134 U. S. 418, 457.

age, weighing, feeding and other services as has been usual in all other stock-yards; and between the yards at Kansas City and those at other points "there is and was for a long time prior to March 12, 1897, active and growing competition among their owners to attract and secure to each the shipment of live stock from competitive territories" (record, p. 74). The master found that the customary charges collected for many years at the Kansas City stock-yards are identical with those at other stock-yards, and that the customary charges for feeding, &c., were either identical with or less than those of other yards (pp. 64, 65).

The year 1896 was taken by consent as a fair basis upon which to test the operation of the statutory schedule. During that year, the gross receipts for yardage at the customary rates were $665,658.05, and for feed, &c., $224,690.88, so that the total gross receipts for the services regulated by the act of March 3, 1897, amounted in 1896 to $890,348.93 (p. 72). If, however, the statutory rates had prevailed instead of the customary charges, the gross receipts for yardage, etc., would have been $441,180.48; and for feed, &c., $148,516.68, so that the total gross receipts would have been $589,697.16, a reduction of $300,651.77, or more than one-third (pp. 72, 73). That this is the extent of the reduction is conceded.[1] The effect on the net income would have been even more radical. The net earnings in 1896 applicable to dividends were at the customary rates, $476,974.08. The net earnings under the statutory rates would have been $176,322.31, a reduction of $300,651.77 (p. 73), or sixty-three per cent.

[1] The Attorney-General states in his brief (p. 54): "The master found, and it is conceded that the application of the Kansas statute to the business of 1896 would have reduced the gross income $300,651.77."

As Mr. Justice Harlan said, quoting from the opinion of the Circuit Court, in *Smyth* v. *Ames*, 169 U. S. 466, 542:

> "It must be remembered that these roads are competing roads; that competition tends to a reduction of rates – sometimes, as the history of the country has shown, below that which affords any remuneration to those who own the property. Can it be possible that any business so carried on can suffer a reduction of 29½ per cent. in its receipts without ruin? What would any business man, engaged in any business of a private character, think of a compulsory reduction of his receipts to the amount of 29½ per cent.?"

The Attorney-General of Kansas, however, contends that certain items, amounting in the net aggregate to $169,584.65, and representing expenditures for betterments, improvements and extensions, should not have been paid out of profits, but should have been capitalized and new stock issued therefor. These improvements, betterments and extensions were mostly in renewal of existing facilities in the old yards (pp. 338, 340), or were made in order to better accommodate the business of the yards, and they did not tend to increase the income or earning capacity of the company (p. 317).

A full description of these improvements and betterments will be found in a stipulation which the parties entered into "for the purpose of removing any question which may exist in regard to the manner in which the earnings of the stock-yards company were disbursed during the years 1892, 1893, 1894, 1895 and 1896 for operations, maintenance, and extension of improvements" (p. 82). The items of 1896 consisted of actual cash expenditures for rebuilding or replacing parts of the existing plant, completing buildings, laying brick pavement instead of plank flooring which had worn out, etc. (pp. 89–91). There has heretofore been no suggestion that this construction was not absolutely necessary, or was not paid out of earnings. But,

because most of the items were betterments or extensions of improvements of the existing plant, costing as to the principal items—*e.g.*, the brick pavement instead of wood—much more than the old wooden pavement replaced, it was insisted that such increased expenditure added to the value of the plant and must be capitalized, although conservative business management would clearly provide for such necessary improvements or renewals out of income.

It is true that the company, prior to 1896, had capitalized most of its extensions or improvements. The contention below was, therefore, that, as the company had capitalized extensions or improvements in the past, it must continue to do so in the future. Under this theory, the company must keep on year after year increasing its capital stock for whatever improvements or extensions the necessities of the business might require, whether or not this construction added to earning capacity. If not willing, *or if unable by the sale of stock or bonds*, to capitalize improvements necessary in order to retain the business and market at Kansas City, the company must cease improving its facilities, and progress must stop. It will at once occur to the court that if any such company could as between itself and the public indefinitely capitalize improvements or betterments and not provide for them out of earnings, it would, in the course of time, inevitably become grossly over-capitalized. It will also occur to every fair mind that in such a case we should find the State of Kansas insisting that betterments and improvements which it was known would not increase the earning capacity ought not to have been capitalized and the additional burden imposed on the public. It would be insisted that the stockholders must either pay for

these improvements out of income, or put their hands in their pockets; but that the public could not be compelled to go on indefinitely paying increased charges in order to furnish returns upon such expenditures.

The reasons why the managers of the company did not feel justified or warranted in capitalizing these improvements were explained in the testimony. Thus, it was shown that the expenditures were of the usual character (pp. 198, 199, 235, 236)—that is to say, every year some different part required renewal or improvement or extension; that the improvements did not constitute any extension of the present system itself (p. 317); that the present facilities were simply renewed or reconstructed (p. 340); that the larger part of the expenditure was upon the old yards and constituted renewals (p. 338); that depreciation even with constant repairs will be fully ten to twelve per cent. per annum (pp. 236, 237), and that the renewals are growing larger year by year (pp. 198, 199). Indeed, it was shown that the plant, which as it now stands has actually cost $1,593,038.07 (p. 350), does not in many portions last more than from three to five years (pp. 121, 443, 590, 591); that it has been twice entirely rebuilt since 1887 (p. 213), and that it was practically all rebuilt within the last seven or eight years (p. 238). *This evidence is not contradicted or impeached in any degree.* The accounts as prepared and kept by the stockyards company do not show a dollar of allowance for depreciation in 1896. Undoubtedly this was because the managers considered that the improvements offset the depreciation. If we take only ten per cent. for depreciation, the minimum testified to, the company would have to set apart *in addition to repairs* over $159,000 every year. The court will note that no allowance whatever was

made by the master or by the court below on final hearing for depreciation, except in the valuation of the structures. Nor was any entry made in the profit and loss account. The reason is apparent. The actual improvements adding to the permanent value were $169,584.65, which was about equal to the *minimum* of depreciation.[1]

In assigning the reasons for dismissing the bill of complaint, Thayer, C. J., does not discuss the point of depreciation, although Foster, D. J., did so in denying the motion for an injunction. The latter adverted to the fact that the master had made no report on the subject, and then proceeded to estimate a depreciation of only $75,400, based upon the assumption that, as to some of the improvements, two per cent. would represent the depreciation, which is without support of competent evidence in the record (record, pp. 871, 872; 82 Fed. Rep. 849) and utterly conflicting with common sense.

Now, it must go without saying that a court of equity will recognize that in the operation of a plant such as the stock-yards, and notwithstanding repairs, there is a constant wearing out of the lumber, &c., from natural causes and use, and a constant necessity for replacing old with new, and that in estimating the profits of operation an allowance must be made for depreciation. This view as to depreciation and that improvements may be properly charged against income is fully supported by the authorities. *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 407; *San Diego Land & Town Co.* v. *City of National City*, 79 Fed. Rep. 83, 87; 174 U. S. 739, 757; *Little Miami, &c., R. R. Co.* v. *United States*, 108 U. S.

[1] It must seem unfair that the master should, in reporting the present value, deduct for depreciation, but allow absolutely nothing for depreciation when reporting the net earnings applicable to dividends.

277, 278; *Union Pacific R. R. Co.* v. *United States*, 99 U. S. 402, 420; *United States* v. *Central Pacific Railroad Co.*, 138 U. S. 84, 86; *Southern Pacific Co.* v. *Board of Railroad Commissioners*, 78 Fed. Rep. 236, 266; *Metropolitan Trust Co.* v. *Houston & T. C. R. Co.*, 90 Fed. Rep. 683, 690; *Whittaker* v. *Amwell National Bank*, 52 N. J. Eq. 400, 404; *Glasier* v. *Rolls*, L. R. 42 Ch. Div. 436, 453; *Dent* v. *London Tramways Co.*, L. R. 16 Ch. Div. 344, 353; *Davison* v. *Gillies*, L. R. 16 Ch. Div. 347; *Regina* v. *Grand Junction Ry. Co.*, 4 Ad. & E., N. S. 18, 41; *Regina* v. *London, Brighton, &c., Ry.*, 15 Ad. & E., N. S. 313, 363; *Regina* v. *Great Western Ry.*, 15 Ad. & E., N. S. 1085, 1088; *Corry* v. *Londonderry, &c., Railway Co.*, 29 Beavan, 263, 273.

If, according to the contention of the Attorney-General, improvements must be capitalized year after year irrespective of the effect upon earnings, then it is submitted that there must, in common fairness, be an allowance for depreciation of at least ten per cent. of the *cost* of the present plant, which was shown to be $1,593,038.07 (p. 350). Therefore, whether we deduct improvements from income and write off nothing for depreciation, or capitalize improvements and deduct a fair amount for depreciation, it will follow that about the sum in question ought to have been deducted from the gross earnings of the property in 1896 before the actual net earnings could have been justly and truly determined.

But, so the argument seemed to run below, the company capitalized in the past whenever it added extensions or improvements, and it cannot stop now; it must continue year after year the practice of issuing new stock and increasing its capital even though this course would ordinarily be imprudent or improper. This should hardly

be a fair argument for the Attorney-General to make. The true interests of the people of Kansas are that the capitalization of such a company, upon which capitalization some return must be earned, shall be kept as low and upon as conservative a basis as practicable. With what patience would a court listen to an argument that a manufacturing corporation, whose earnings had reached their probable maximum, should capitalize every betterment and improvement, and issue bonds or stock for new machinery or fixtures; or even to an argument that a railroad company, which is a far more permanent business, must capitalize year after year all expenditures for increased weight of rails, for improvement of existing road-bed, for station houses rebuilt in brick or stone to replace wooden structures, etc., etc., notwithstanding the fact that the managers believed that there was a constant depreciation from wear and tear equivalent to these improvements and that the company had reached its maximum earning capacity?

The officers truthfully stated why they could not properly or honestly continue to capitalize improvements and sell stock to the public to provide the necessary funds. In addition to the facts above discussed, they showed that the plant in 1896 had been completed (p. 237); that the construction account was closed (p. 238); that even in the past only a part of such expenditures were capitalized (p. 344); that the authorized capital stock of the company was $7,500,000 (p. 237), of which only $131,350 remained unissued (p. 238); that this unissued stock had been reserved to buy additional necessary real estate (*id.*); that the business of the company had in their judgment reached its maximum (pp. 187, 238, 239, 325, 326, 339); and that there was then no

anticipation of increase of business (p. 240).[1] In other words, they considered that the receipts of live stock had reached the maximum number to be marketed in territory tributary to this market (p. 385), and that, consequently, the earnings would probably not increase. Can it be doubted that, under such circumstances, the stock-yards company would not have been justified in selling new stock which could not of itself earn a dividend, or in selling new bonds upon which they would not earn the interest, and that this court will sanction and approve the making of these necessary improvements out of earnings if only about equal to a fair provision to cover inevitable depreciation?

In order to demonstrate the truth of this assertion that the business of the company had probably reached its maximum, the attention of the court is earnestly called to the figures shown in the testimony and exhibits on file. Thus, the business of the yards, as evidenced by the number of live stock handled, increased from 167,199 head in 1871 to 2,522,239 head in 1884, or over 1,500 per cent., and from 2,522,239 head in 1884 to 4,986,955 head in 1890, or about 100 per cent.; but between 1890 and 1896 the receipts increased to 5,471,246, or less than 10 per cent., of which increase nearly all was made in 1896 over 1895. The receipts of hogs since 1890 have never equaled those of that year (p. 385). As shown in the testimony of Mr. Morse, the general manager of the stock-yards company (p. 239), the receipts of cattle, which in

[1] Mr. Morse, the general manager of the company, explained the situation at page 239: "It is my judgment and the judgment of those who have looked most carefully into the matter that we are very near the maximum point on our business at this time." In testifying again on this point at page 339, he said: "Another reason [*i. e.*, why the improvements of 1896 were not capitalized] was that we regarded the business as approaching a maximum now; it has not varied materially from year to year."

1893 were 1,071,776 head, were only 863,430 in 1896, *a loss of 208,346 head;* the receipts of calves, which in 1893 were 57,000 head, were only 33,000 head in 1896, *a loss of 24,000 head;* the receipts of hogs, which in 1890 were 2,051,589 head, were only 1,625,848 in 1896, *a loss of 425,741 head;* and the receipts of sheep, which in 1893 were 295,000, were 294,000 in 1896. Although there was an increase in the total number of head in 1896, the average receipts of the seven years of 1890–1896 were less than the receipts of 1890. Surely, it is no pretense to say that these figures admonished the managers of the company that it was time to cease issuing new stock for improvements; and it is fair to assume that any court of equity, far from condemning, will applaud this conservative and honest policy. A man may well be justified in capitalizing improvements while his business increases; but, after the maximum had been reached, it would obviously be improper if not dishonest to sell new stock for improvements and make no provision for depreciation.

These facts and figures ought to establish beyond cavil the propriety and truth of the position taken by the managers of the stock-yards company in respect of the necessary improvements and betterments made in 1896, namely, that they could not consistently issue and sell new stock or bonds to provide the funds, and that they could properly charge the improvements against earnings, because they fairly equalled the depreciation.

A different view would lead to results which sound policy ought to forbid. The court will not declare that, under the circumstances disclosed by this record, the stock-yards company must necessarily go on indefinitely capitalizing such expenditures. It would be difficult to

imagine a more objectionable and dangerous system of corporate financing in the case of a company in which the public has an interest to prevent excessive capitalization.

Expressions in some of the reported decisions may be found to the effect that improvements and betterments in the case of railroads should be provided for out of capital stock or bonds. A careful examination will disclose that none of them presented facts similar to those now before the court. Some of these cases turned upon peculiar provisions securing the rights of income bondholders or preferred stockholders, or the claims of the government as in the Pacific Railroad cases. But in every one of the rate cases where this point has been presented, the courts have uniformly ruled not only that allowance for depreciation was proper, but also that betterments and improvements could fairly and equitably be charged against income.

The fact that the improvements in question were charged to a construction account or were called permanent improvements is immaterial. The controlling element is that the expenditures were necessary in order to keep the stock-yards in serviceable condition, and this fact is undisputed. Certainly the mere title under which these expenditures are once stated is not sufficient to overthrow the facts so fully and clearly shown: that the improvements were necessary; that they were about what will be required yearly; that they only equal the annual depreciation of the plant; that they do not increase the earnings, and that the business in all probability has reached its maximum. As Mr. Justice Brewer said in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 407:

> "Those are facts whose significance cannot be destroyed by any mere manner of bookkeeping or classification of expenditures."

There remains to be noticed a mistake in the brief of the Attorney-General. The statement is made that these improvements were actually capitalized and stock issued to the stockholders to represent the expenditure (brief, pp. 50–52, 68). The record shows the contrary (pp. 237, 238, 339, 345).

Referring to this item of $169,584.65 the answer of Attorney-General Boyle states the fact as follows (p. 885):

> "And the reasons for a failure to capitalize said improvements for 1896 were that there was a surplus in the treasury at Kansas City in excess of said amount, besides the large surplus in the Boston financial office, and the amount of stock that might be issued without amendment to the charter or filing a new charter was less than said sum, and it was intended to use the remaining stock for the purchase of certain lands north of the north yards."

When we reflect that this statement was sworn to and filed after all the testimony had been taken and after the application for an injunction had been denied by Foster, D. J. (pp. 867, 874), the answer must be taken as most persuasively, if not conclusively, supporting the position that stock was not issued for the improvements made in 1896. The Attorney-General ought not to be permitted now to change front and mend his hold by the claim that the improvements were capitalized.[1]

But, the evidence shows that no part of the outstanding stock, amounting at par to $7,368,653, was issued after June 25, 1896 (pp. 287, 291). The express finding of the master and court below and the uncontradicted testimony

[1] *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267.

is that the extensions of improvements made in 1896 *were not capitalized* (pp. 62, 71, 237, 238, 287, 345.) There can be no misunderstanding upon this point in view of the explicit proof in the record.[1]

It is, therefore, submitted that the improvements made in 1896 and amounting to $169,584.65, equalling as they do the annual depreciation of the plant, should, in justice to the stock-yards company, be paid out of the earnings and treated as a fit and proper deduction from the income, before calculating or attempting to determine the net profits which the property earned in 1896. If this be true, then it necessarily follows that the result of the statutory schedule is to reduce the net earnings from $476,974.08 to $176,322.31, a reduction of over sixty-three per cent. In view of this radical effect upon the income of the stock-yards company, it is not surprising that both the judges below should have confessed that they thought the reduction "radical" and that the issues were balanced with doubt. And had they not misconceived the rule of law, the judgment would have been in favor of the right of the stock-yards company to continue to conduct its business as heretofore and to collect the customary charges. The reasonableness of those customary charges will be discussed under point V. of this brief (p. 59).

[1] Mr. Morse testified at page 237 (and the expert who examined the books on behalf of the Attorney-General practically confirmed this, pp. 740, 741): "Q. State if any of the expenditures made from the gross earnings in 1896, other than ordinary operating expenses, have been capitalized—that is to say, represented by an issue of capital stock. A. No, sir; there has not. Q. Any of the operating expenses been capitalized, Colonel Morse? A. No, sir; they have not." And at page 345: "Q. You were asked something about the capitalization of earnings that were expended for construction or cost of maintenance in certain years. Were they capitalized in 1896? A. No, sir; they were not. Q. Can they ever be capitalized in the future? A. No, sir."

IV.

The fair present value of the stock-yards property and of its capital stock.

The Attorney-General of Kansas now candidly concedes that neither the cost of the property nor the amount of the original investment is controlling as a basis of valuation; that the property has greatly increased in value, and that the stock-yards company should be permitted to earn a reasonable interest upon the present value of its property. As stated on pages 76-77 of his brief:

> "We do not ask that the Kansas City Stock-Yards Company be permitted to earn only a reasonable percentage of profit upon the money which has been actually invested in its business or upon the actual cost of its property. *We recognize the fact that this property has greatly increased in value since the organization of the stock-yards, and we are willing that the company be permitted to earn a reasonable interest upon the value of its property.*"

This broad-minded and frank concession, embodying as it does the true and just rule of law, has greatly simplified and narrowed the discussion. On the record, then, only two points remain to be discussed, namely: (1) what is the true and fair value of the property as shown by the record; and (2) what is a reasonable interest upon money invested in an uncertain industrial enterprise of this nature. It is important to call attention to the fact that the Attorney-General does not attempt, in any aspect of his discussion, to contend that reasonable interest in Kansas would not equal at least six per cent., nor to challenge the correctness of the following statement of Thayer, C. J., below (record, p. 945; 82 Fed. Rep. 856):

> "Conceding, as we must, that the legislation complained of was radical in its nature and effect, that it reduced the company's income about fifty per cent., *and that it prevents it from realizing on the capital invested in its plant such a per cent. as is ordinarily realized on capital invested in other mercantile and business enterprises*, &c."

In view of the mass of testimony contained in the transcript of this record, every effort will be made to save the labor of the court by reference to facts as to which there is no conflict; and so far as may be practicable, the appellants will adopt in this reply the figures of the Attorney-General and of the master, even though these figures are to some extent inaccurate. A fair approximation of what the record shows and a general but accurate statement of the material facts or points will be of more aid to the court than any elaborate analysis and weighing of the proof or any extended mathematical calculations.

1.

As to what is reasonable interest or compensation on such an investment.

The Attorney-General says that "we are willing that the company be permitted to earn a reasonable interest upon the value of its property" (defendant's brief, p. 77). The rate he would deem a reasonable interest is not stated, but presumably it would be at least six per cent., because he strives to show that the statutory rates afford a much greater return.

The appellants do not contend that owners of stockyards are entitled as matter of fixed right to earn at least six per cent. upon the value of their property and capital invested in the business irrespective of the reasonableness of the charge made to the public. But they do urge that in all fairness and justice they are entitled to receive the fair value of money in the State of Kansas so long as the charges are customary and in themselves reasonable for the service rendered. They simply ask the fair value of money so invested in industrial enterprises "as it stood in the markets of the world, and not as prescribed by an act of the legislature."

The business and the receipts at the yards have been built up by the industry and energy of the managers and owners of the stock-yards and by the risk of their capital. The stock-yards would never have been established nor a dollar invested in such an uncertain and speculative venture (pp. 442, 458) if the owners had conceived it possible that, as soon as they had built up a large trade and successful business, the legislature would step in and limit their profits below the rate at which they could lend money without practical risk. Indeed, if the owners of the stock-yards were tomorrow seeking to purchase land and establish new yards and to borrow money for that purpose in Kansas, they would have to pay at least six per cent., and probably as high as from eight to ten per cent., for the use of the money. In that event, their earnings under the statutory rates would clearly be less than their fixed charges. The question cannot be changed in its substance because this company has been so well and conservatively managed that it has not a dollar of bonded debt, and has secured all the money it needed either by cash contributions of the stockholders or by the investment in the enterprise of profits as they accrued from time to time in the past.

The statutes of Kansas provide that the rate of interest for the use of money shall be six per cent. in the absence of an agreement fixing a different rate, and that the maximum shall be ten per cent. This provision is the expression of the thought and estimate of the state itself as to the value of money and as to what justice requires for the use of it. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 411. It is the legal measure of the value of the use, not only of money, but of property generally, and is a fair and just basis in almost all cases.

Loudon v. *Taxing District*, 104 U. S. 771, 774; *Spalding* v. *Mason*, 161 U. S. 375, 396. In Kansas all loans upon the security of real or personal property earn from six to ten per cent. when there is practically no risk for the lender. The rate of six per cent. is seldom accepted, and the maximum is frequently stipulated for, particularly in industrial ventures. The most conservative investments in the state, such as municipal bonds, bear from seven to ten per cent. interest as shown in the principal brief filed on behalf of the appellants. It is, of course, a matter of common knowledge that the reasonable expectation of profit in industrial ventures is always more than what a man can secure by lending his money on security, for the obvious reason that the risk is greater. The court below frankly conceded that the rates prescribed by the legislature in this case prevent the stock-yards company "from realizing on the capital invested in its plant such a per cent. as is ordinarily realized on capital invested in other mercantile and business enterprises." Will it not be a gross injustice under such circumstances for a court of equity to adjudge that the stock-yards company is not entitled to reap the legitimate reward of a successful industrial venture? Will it not be held to be substantial justice—just both to the public and to the owner of the stock-yards—that such owner shall be entitled to earn at least the minimum allowed by the state statute when money is loaned upon security? If this be so, the court will hold that, as the legislative rates afford, in no reasonable aspect of the proof contained in the record, anything like six per cent., the statute violates the property rights of the owners of these stock-yards.

As Mr. Justice Brewer said in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 410:

"The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain. If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?"

2.

As to the present value of the property used by the public for pecuniary profit.

The real dispute between the parties at the time the testimony was being taken, as clearly shown by the record, was as to the basis of valuation. The appellants contended that the property of the company should be valued in its present condition as a stock-yard, to which special purpose the company's lands, by reason of their location and surroundings, were especially adapted. The Attorney-General, on the other hand, contended that the valuation should be as if bare land, irrespective of its special adaptability and value, to which might be added the value of the improvements or mere cost of reproduction. Upon the question of the value of the land owned by the stock-yards company and devoted to stock-yards uses, the witnesses testifying as to values are to be divided into two distinct classes. In the first class are the witnesses called on behalf of the appellants, who either valued the property in its present condition, or valued the lands with particular regard to their special value for stock-yards purposes in view of their location and surroundings. In the second class are the witnesses called on behalf of the Attorney-General, who testified solely to the value of the property as bare or

naked land without regard to its value with improvements or for stock-yards or railroad purposes. *There was not a single witness called on behalf of the defendant who testified to the value of the land for stock-yards purposes; but, on the contrary, all except one had to admit that they did not calculate or include any such purposes in their estimate of the value* (pp. 619, 621, 632, 637, 645, 666, 683, 684, 696, 697), *and the testimony of the one witness who did not so state is of little value* (pp. 632, 637, 645). The portions of the record which establish the absolute accuracy of this statement are set forth in the principal brief filed on behalf of the appellants (pp. 74–77).

In order to avoid useless discussion upon the elements of valuation or mere definitions, we may consider the statement now made by the Attorney-General upon this question. He states as follows (defendant's brief, p. 27):

> "That the value of the real estate is to be determined by considering it as a body of naked land upon the general market, subject to purchase and sale for all purposes for which a demand may exist—for *stock-yards*, for railroads, for packing-houses, for manufacturing and mercantile purposes, with all the advantages which may accrue to it in consequence of its location near the corn belt as well as the cattle ranges of the country, in the heart of a great city, surrounded by all the railroads, packing-houses, manufacturing and mercantile plants there existing and in operation, and by reason of the limited area of land in the vicinity available for such purposes."

This being the basis now conceded by the present Attorney-General, we again assert that none of the witnesses called by his predecessor testified that they estimated the value of the property for stock-yards purposes or included the elements which the Attorney-General now concedes should have been properly considered in estimating the true value. Therefore, this statement practically concedes

that the estimates of none of the witnesses called on behalf of the Attorney-General are to be taken or relied upon.

The Attorney-General is hardly warranted in stating, in the brief filed in this court (p. 27), that the "capital stock issued and outstanding is admitted to be far in excess both of the amount of money actually invested in the concern and of the value of the tangible property." No such admission was ever made, and the facts and record do not support any such statement.

The cash investments of the owners of the stock-yards in this enterprise and the present values, according to the master's basis and the concession of the Attorney-General, may also be stated here in order to dispel some misconceptions as to what the facts really are, as shown by the record.

The present cash investments are:

1.	Cash investment for stock at par	$2,484,500 00
2.	Earnings invested in property and improvements instead of being distributed	2,369,173 00
3.	Conceded increase of value of land as reported by master	1,575,641 44
	Making a total investment of	$6,429,314 44

The present value, however, should be:

1.	Master's report of value of land now actually used for stock-yards purposes, divested of all improvements (p. 77)	$3,600,626 00
2.	Master's estimate of improvements, *after deducting over $113,000 from cost for depreciation* (p. 77) about	1,480,000 00
3.	Master's estimate of property not then used for stock-yards purposes, including working capital (p. 76)	1,200,000 00
4.	Master's report as to actual cost of locating packing industries (p. 61)	817,944 28
5.	Master's report as to supplies, &c., on hand (p. 77)	307,377 25
	Making a total of	$7,405,947 53

or $37,297.53 in excess of the $7,368,650 of capital stock issued and outstanding taken at par.

The actual cost of the bare or naked land used for stock-yards was $2,064,984.56 (p. 64); and the master, valuing it on an erroneous basis as bare or naked land, reported that the bare land had increased in value to $3,600,626, or an increase of $1,535,641.44 (p. 77). If he had allowed for the value of the property in its present condition, having regard to its peculiar adaptability to stock-yards purposes, it cannot be doubted that he would have reported that the value of the bare land had increased to at least $5,000,000, during the long period which the stock-yards company had held it. The appellants insist that even the bare land had increased in value much more than the master reported—at least double the increase of $1,535,641.44 allowed by him. It will be observed that while the master reported that the main yards in Kansas (40.659 acres) had increased from a cost of $230,110.81 (p. 64) to $1,219,770 (p. 77); yet he reported that the main yards in Missouri (41.708 acres) had increased only from the cost of $1,691,619.59 to $1,876,860 (pp. 64, 77).

Now, if the court be satisfied that this property has really increased in value more than this finding, it will allow the full measure of that increased value, for that is the legal right as well as the just equity of every property owner. This actual present value, even if the property had cost nothing, would clearly be the basis of valuation for every other purpose, including taxation and condemnation proceedings, and would be at once recognized by every fair-minded business man and every impartial court as the just value—just for the purpose of barter and sale, just for the purpose of taxation, just for the pur-

pose of condemnation to accommodate some superior public use.

In connection with the determination of the amount of increase in value, it will be pertinent to refer to a few well-known facts as to the remarkable growth of Kansas City. When the stock-yards were established, the land taken for that purpose was wild, covered with trees and surrounded by prairie or sand banks (p. 127), and there was no market (p. 185). It is now in the centre of the business portion of a great city; it is surrounded by a vast system of railroad tracks and terminals; and immediately and conveniently adjacent are situated immense packing and industrial concerns. Kansas City was but a small village when, in 1865, the Union Pacific Railroad Company reached it. At the time the census of 1870 was taken, there was no such town as Kansas City, Kansas, to which to assign any population or value. Indeed, in 1880 its population was only 3,200, which increased to 38,316 in 1890, to 41,150 in 1897, and to 45,000 in 1898, an increase of over 1,400 per cent. since the stock-yards were established. The assessed valuation of the real property in the whole county of Wyandotte, Kansas, which was $1,612,342 in 1870, had increased to $10,895,371 in 1890. The products of all the industries in Wyandotte county, which in 1870 amounted to $755,051, were $58,132,679 in 1890. The value of the meat packing product, which in 1870 was absolutely *nothing*, had in 1890 already reached $39,927,192. The number of head yarded in 1871 was 167,199, of the value of $4,210,605, and in 1896 the number of head yarded was 5,471,246 of the total value of $103,402,298. So also of Kansas City, Missouri. The population, which in 1870 was 32,260, had become

132,716 in 1890, and was 160,000 in 1897 and 175,000 in 1898. The assessed valuation of the real and personal estate in the whole of Jackson county, Missouri, which in 1870 was $16,103,332, had increased to $95,932,877 in 1890. The bank clearings of Kansas City which were only $20,407,967 in 1875, were $540,837,381 in 1897.

The evidence also shows marvelous increases in values of land. Conspicuous instances were cited of property worth $1,000 to $2,000 per front foot (p. 488), and one witness testified that land which he could have bought for $75 an acre twenty years ago was now worth $1,000 a front foot (p. 562), which would be the equivalent of $250,000 per acre, or an increase of over 3,000 times the cost.

In view of these enormous changes in conditions at Kansas City, it would, indeed, have been preposterous if the Attorney-General had ventured to urge upon this court that the land of the Kansas City Stock-Yards Company, more than one-third of which (forty acres) was purchased as far back as 1871, and fully three-quarters of which was purchased prior to 1880, had not greatly increased in value.

To repeat, the record clearly shows that all the witnesses testifying on behalf of the Attorney-General valued the land owned by the stock-yards company on the hypothesis that it was naked or bare land, divested of all improvements. The master valued on this basis (p. 77). None of these witnesses attempted in any manner to value the improvements, nor did any of them attempt to testify as to the value of the property in its then present condition, although some of these witnesses conceded that the property was in a most available situation and was especially adapted for stock-yard purposes by reason of its singular location amidst surrounding railroad systems and packing and other manufacturing plants. Yet none

of them estimated the fair and just value of the property for its most available and valuable purpose (pp. 619, 621, 632, 636, 637, 645, 683, 684, 696, 697).

The theory of the defendant below was that the property was to be valued upon the basis of naked or bare land dissociated from its present or past use, and this rule was followed by the master in arriving at the conclusions stated in his report and adopted by the court below. As the master states in his report, "the evidence on this subject was all adduced on the hypothesis that the land was divested of all improvements, but upon consideration of all adventitious advantages accruing to it from its location and environment, and upon this basis my estimates of the value of such real estate are made" (p. 77). There can be no question that this basis excluded all consideration of (1) the value of the land in its actual condition with its valuable improvements, and (2) the value of the land for its most available and especially adapted purpose, namely, stock-yards. That this special stock-yards value is an entirely proper element in any estimate is emphasized by the present argument of the Attorney-General (brief, p. 70) that there must of necessity be a large stock-yards at Kansas City, and that, "if the Kansas City stock-yards were to-day wiped out of existence another market-place would soon be found where all the business would be done, and as much business would center there as is now centered at these yards." Yet the uncontradicted testimony is that no other equally available site exists in Kansas City (pp. 527, 634), and consequently *this* site must have an especial value for what is absolutely necessary to Kansas City, namely, stock-yards, although the same number of acres might be obtained several miles away.

If the court shall hold that this property can, with any degree of fairness and justice to its owners, be valued on the basis of naked land, and without regard to its special value for stock-yards purposes, it may well be conceded that there is some evidence in the testimony of the defendant's witnesses tending to sustain the master's finding of $3,600,626 as the present value of the land, although the preponderance of qualified testimony showed a larger value; but if, on the contrary, the true and only just basis in such a case is (1) the value of the property as it stands with its improvements and (2) the value of the land itself with due regard to any particular use to which it is especially adapted, then the master's estimates and all the testimony on behalf of the defendant will of necessity be disregarded, and the court must determine from the testimony of the complainants' witnesses the true and just value.

It cannot be that, in a court of justice seeking to adjudge what is fair and just as between the owner and the public, every element of value which would govern any conservative business man is to be discarded, and the mere cost of reproduction is to control. There can be no question as to the special availability of this property for stock-yard purposes, surrounded as it is by railroads and packing houses. That it is so available is now practically conceded; and that fact necessarily increases its value. For that purpose, it is worth more than for any other purpose. Surely, it cannot be that its value for the purposes of this controversy is to be determined without regard to the one controlling and essential feature which would determine its real, actual or fair value in every other conceivable relation.

We may suppose that a legislature was about to regulate the charges of a hotel in Kansas City, situated as conveniently as the Arlington Hotel is situated in Wash-

ington. In ascertaining the value of the property, would it be just to discard its value for hotel purposes and value it as naked land plus the value of the improvements? Would this basis be fair even in a condemnation proceeding? Would not the owner be entitled to show the special value of the property and its large earning capacity for hotel purposes? Would it be held that the only values to be considered in a court of justice were the bare or naked land and the cost of reproduction? How preposterous it would sound for counsel to argue that the hotel owner could buy cheaper land a mile or two away and build a hotel there! Take the case of the large dry-goods concern at Kansas City, the Emery-Bird-Thayer Dry Goods Company.[1] It occupies a large building, which is valued at several hundred thousand dollars an acre. If that land were about to be condemned for a railroad station, would not the owners be entitled to show that the property was especially valuable in that locality for the retail dry-goods business? It would obviously be grossly unjust to compel the owners to accept compensation upon the basis of bare land and cost of rebuilding. How unreasonable it would sound for counsel to argue that the owners could secure an equal amount of land a mile or two away from the business centre, and there build an equally large store!

Yet in the case at bar the Attorney-General suggested below, and may urge again, that the owners of the Kansas City stock-yards might move elsewhere, where they could secure cheaper land, but where, of course, they never could secure the advantage of adjacent packing plants and railroad terminals without the expenditure of many millions of dollars.

[1] Situated at Walnut and Eleventh Streets, Kansas City.

If we take the testimony of the appellants' witness we shall find the value of the bare land divested of all i provements to be fully $5,000,000 for stock-yards p poses, or $1,400,000 more than the master estimated. T would be an average valuation of $40,000 an acre, $4,000 a lot. The master only allowed an increase of $580,6 for the whole period from January 1, 1884, to June, 18 or over thirteen years, the period of the greatest dev opment of the city. That the land had increased $995,0 between 1871 and 1883 was not disputed. This was t increase which was capitalized on the reorganization January, 1884. As matter of fact, the land has increas over $2,000,000 since January 1, 1884 (pp. 491, 497, 5 542, 543, 556, 563, 564, 571).

In addition to this value as bare naked land, we ha great improvements now worth, after deducting deprec tion, fully $1,480,000, and used in connection with immense business. It cannot be doubted that, as b tween men dealing in the markets of the world, t value of such a property would be more than the ba value of the naked land and of second-hand materials. we allow any fair amount for this combination, we sh easily conclude that the minimum valuation of $9,000,0 for the whole, as testified to by the complainants' witness is not at all excessive and fully justifies the premium which the stock had sold. The summary on page 57 this brief will show how this is made up.

The rule which obtains in condemnation proceedin under the exercise of the power of eminent domain as what should be the elements in estimating the value property may assist by way of analogy, although there a many equities entitling us to more consideration than usually accorded a property owner where, under conde

nation proceedings, his property must be taken for a necessary public use. (See the suggestion of Mr. Justice Brewer in *Ames* v. *Union Pac. Ry. Co.*, 64 Fed. Rep. 165, 178.) Yet, the court below refused to accord even what would be just in condemnation proceedings.

In *Boom Co.* v. *Patterson*, 98 U. S. 403, it appeared that the boom company had been invested with the power of eminent domain and was seeking to condemn parts of two islands. The land in question, if assessed simply according to its value as bare land, aside from any consideration of its value for boom purposes, was worth only $300; but, in view of its adaptability for those purposes, the jury found a further and additional value of over $9,000, making the total allowance $9,358.33. The trial court reduced the verdict to $5,500, and the question argued in this court was as to the principle upon which the compensation was to be estimated. Mr. Justice Field, delivering the unanimous opinion of the court and reviewing the authorities, used the following language (p. 407):

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.
>
> "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional cir-

cumstances will modify the most carefully guarded rule; but as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

In the case of *National Waterworks Co.* v. *Kansas City*, 62 Fed. Rep. 853, Mr. Justice Brewer was called upon to investigate and determine the principle upon which a water company should be compensated when its property was taken by the city under the reserved right to do so at the expiration of the franchise. The argument advanced on behalf of the city was that the value should be limited to the cost of reproducing the plant. This case was never appealed, and the city acquiesced in the finding of the court. In the course of a very carefully prepared opinion, Mr. Justice Brewer said (p. 865):

"It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is to-day. A completed system of waterworks, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city,—not only with a capacity to earn, but actually earning,—makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction. The fact that the company does not own the connections between the pipes in the streets and the buildings—such connections being the property of the individual property owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for, a waterworks system without a single connection between the pipes in the streets and the buildings adjacent. Such a system would be a dead structure, rather than a living and going business. The additional value created by the fact of many connections with buildings, with actual supply

and actual earnings, is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners, and are secured only by efforts on the part of the owners of the waterworks, and inducements held out therefor. The city, by this purchase, steps into possession of a waterworks plant,—not merely a completed system for bringing water to the city, and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn, but is in fact earning."

See also *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326, 328; *Grant* v. *East & West R. Co.*, 54 Fed. Rep. 569, 576; *Dupuis* v. *Chicago & North Wisconsin Ry. Co.*, 115 Ill. 97, 100; *Chicago, Peoria & St. Louis Ry. Co.* v. *Eaton*, 136 Ill. 9, 14; *Snouffer* v. *Chicago & Northwestern Ry. Co.*, 105 Iowa 681; *Drury* v. *Midland Railroad*, 127 Mass. 571, 582; *Columbia Delaware Bridge Co.* v. *Geisse*, 38 N. J. Law 39, 42; *Miller* v. *Windsor Water Co.*, 148 Pa. St. 429, 439; *Mifflin Bridge Co.* v. *Juniata Co.*, 144 Pa. St. 365, 367; *Montgomery Co.* v. *Schuylkill Bridge Co.*, 110 Pa. St. 54, 59; *Rippe* v. *Chicago, D. & M. R. R. Co.*, 23 Minn. 18, 23.

It is, therefore, submitted that the testimony of the complainants' witnesses, who alone valued the property for stock-yards purposes, must be accepted, and that their minimum valuation fairly establishes at least $5,000,000 as the value of the bare land without improvements.

3.

As to the stock dividends.

Between 1871 and 1894 the owners of the stock-yards property from time to time invested in the enterprise $2,484,500 in cash, and they received for their contributions an equal amount of stock at par. All of

the stock at any time sold was subscribed and paid for in cash at par. The company also invested year after year a large part of the surplus earnings in new property or permanent improvements. In other words, instead of dividing all the earnings and issuing stock or bonds for the funds to make necessary improvements, they invested surplus earnings. Of these surplus earnings, $2,369,173 were capitalized, and stock was issued to the stockholders at par to represent their respective distributive shares in these earnings.

The Attorney-General suggests in his brief, as a prejudicial circumstance, that these stock dividends, representing permanent investments made from earnings of the company, were "issued to the stockholders without the payment of any money by them" (p. 4). While this is true in the letter and form, it is not true in the spirit and substance. There is absolutely no dispute that net profits of the company were invested in the purchase of additional land and in permanent improvements to the amount of at least $2,369,173, for which capital stock was issued. There can be no question, either in law or common sense, that the stockholders could every year, from the beginning, with perfect propriety have taken out of the business all the net profits, and sold stock at par or bonds to procure the funds found necessary from time to time for the additional property and improvements. Instead of taking the money in dividends and then obtaining the necessary funds through sales of stock or bonds, the stockholders allowed the net earnings, which equitably belonged to them, to be permanently invested in the business, which was then constantly growing. If they had divided all the net earnings

and sold $2,369,173 of stock or bonds to the public, there would today be absolutely no question but that the business represented an investment of that amount. Added to the other cash contributed, it would make the total actual cash investment $4,853,673. This court will look at the substance and not at the form; and it will never hold that the owners of this stock-yards property are prejudiced because, instead of dividing all net earnings and selling new stock or bonds for new property and improvements, they saw fit to adopt the more conservative course of using the net profits and representing such capital expenditures by stock dividends.

It is also suggested, as a prejudicial circumstance, that dividends were issued to represent the increased value of the lands. Now, if there was an increase in value, this was a perfectly honest and legitimate transaction. If there was no increase in value, it was not honest or legitimate, and would constitute a most objectionable form of stock watering, which no court should take into consideration in determining the true value of any property. As we have already seen, the Attorney-General frankly admits that "this property has greatly increased in value since the organization of the stock-yards," and concedes that the increase in value was as reported by the master, namely, $1,536,031 above cost (record, pp. 64, 77; defendant's brief, p. 73). The only capital stock issued to represent increased values was $995,000 in 1884 on the organization of the new company and $1,058,067 in 1888, making together $2,053,067, which covers the whole period of twenty-seven years and the growth of Kansas City from a village to a great city. Therefore, the only dispute can be as to the difference between the increase found by the master and the stock

issued, and that difference is $517,036. But there is absolutely no evidence that when these stock dividends were declared, the actual value of the property did not more than justify the amount of stock issued. Besides, the dividends were in 1883 and 1888, a period of prosperity and high values; and the testimony and valuation in 1897 were taken at a period of extraordinary depression of values all over the country and particularly in and about Kansas (pp. 442, 445, 489, 520). There should be no reasonable doubt that the increased value of the land was very much more than the stock issued to represent increased value.

The Attorney-General states that the increased value of land capitalized by the issue of stock amounted in the aggregate to $2,593,067 (brief, pp. 4, 5). This is clearly an error, which has resulted from a mistake made by the master in the table prepared by him and printed in the record at p. 79. The master reported, as part of "the stock dividends based upon increased value of lands" $40,000 of stock issued at par in 1879 to Fowler Brothers and $500,000 issued at par in 1893 to the Armour Packing Company for the purpose of inducing them to establish packing plants in the immediate vicinity of the yards (p. 61). There is no pretense that Fowler Brothers and the Armour Packing Company did not receive this stock, nor is there any doubt that it was issued as the equivalent of an equal amount in cash. It is not contended that this stock was improperly or improvidently issued or without full value received, or that the stock-yards company and the market at Kansas City have not been immeasurably benefited thereby. The propriety of the expenditure is discussed below on pp. 53-55 of this brief. But in any event, whether the issue or payment was wise or not, no court can possibly hold that this payment to third par-

ties constitutes, directly or indirectly, in any shape or form, a stock dividend distributed among the stockholders.

Another branch of this feature of stock dividends should be explained. Between 1871 and 1884, the original company from time to time increased its capital stock to represent either money put in or undivided earnings invested in additional property, betterments, improvements or extensions. In December, 1883, the par value of its capital stock was $995,000, and it represented either cash put in or, what is the equivalent, earnings re-invested. In the meantime, that is to say, between 1871 and 1883, the property had increased in value with the advance of the city itself and the increase of all surrounding property, so that the value of the land and improvements then actually used or retained for stock-yards purposes amounted to at least $1,990,000 irrespective of other lands not used for that purpose and which were not then transferred. *The testimony is undisputed that these lands and improvements were then fairly valued and were actually worth at least $1,990,000* (pp. 212, 213, 217, 218, 230). *None of the witnesses called on behalf of the defendant ventured to contradict the complainants' testimony as to the value of the property in 1884, and no evidence in the case tends in the slightest degree to impeach or lessen the effect of the direct proof that the property retained in 1884 for stock-yards uses was worth at least $1,990,000.*

The stock-yards company in December, 1883, determined to increase its capital stock to the true value of the property it owned and used for stock-yards purposes. It found it impossible under the laws of Kansas to further increase the capital of the existing company, and therefore a new company was organized with substantially the same

name, and to this new company the old company sold its stock-yards property for $1,990,000, which was paid in new capital stock at par. As the record clearly establishes that this property was then worth at least that amount, there is obviously no ground for criticising or condemning the change of capital or reorganization. Instead of selling the property, as could easily have been done, realizing $1,990,000, and distributing it among the stockholders, the company saw fit to reorganize and recapitalize the business, and place the par of the capital stock at what was indisputably the fair, true, honest and intrinsic value of the tangible property it represented. If the property, which then covered nearly one hundred acres, with the buildings, pens and other improvements thereon, had increased or doubled or trebled in value by reason of the development of the city and of the market, the owners were by every rule of justice and common fairness entitled to the benefit of that increase. The substance of the transaction was to give the stockholders of the old company two shares of new stock for one share of old stock; and the result was the same as if the company had then sold its property for $1,990,000 in cash, and had distributed the proceeds *pro rata* among the stockholders. In a word, the stockholders got $200 in stock for each existing share instead of $200 in cash. This was in no sense a watering of stock. Of course, it is not claimed on behalf the complainants that the fact that a new company was organized instead of increasing the capital stock of the old company makes any substantial difference; but it is insisted that the transaction was in every aspect legitimate, for it was perfectly proper and honest, legally and morally, to increase the stock if the valuation clearly justified it.

4.

As to the expenditures for establishing packing plants and as to working capital.

The evidence shows and the master found that the stock-yards had paid in cash, land and stock $817,944.28 in order to induce the establishment of packing plants in the immediate vicinity of the yards, and thus create a constant demand and stable market. The master's report briefly summarizes this feature of the case as follows (pp. 60–61):

> "At the date these yards were opened by the Kansas Stock Yard Company, there were no packing-houses at Kansas City, but soon thereafter a small one was established by Bigger & Company, with a daily capacity of from 100 to 150 hogs. This was followed by the erection of several beef, pork and mutton packing establishments in the immediate vicinity of the yards, with a large capacity for the slaughtering of live stock, amounting in 1896 to 894,537 cattle, 58,331 calves, 2,263,143 hogs and 685,727 sheep. Many of these establishments were secured to locate at Kansas City and in the immediate vicinity of the yards by the energetic, persistent and continued efforts of the defendant company, and of the company to whose rights it succeeded as hereinafter set forth, by the payment of large sums of money, the conveyance of valuable real estate, and the issuance and delivery of shares of its capital stock. . . All of these companies are now actively engaged in business near the yards, except Kingan & Co. and Hollis & Co., neither of which has been in business for at least two years last past."

The question is whether this necessary expenditure ought properly and fairly to be considered in determining the amount upon which a reasonable rate of interest or return may be earned. Of course, the fact that in two instances stock which was worth above par was issued instead of money (p. 318) cannot make any difference. The stock itself could have been sold and the money paid over.

All the witnesses agreed that the existence of these packing plants in close proximity to the yards was the main cause of the growth and stability of the

market at Kansas City (*e. g.*, p. 451). The necessities of these plants create the constant demand, and without these packing houses the market would not exist. Indeed, during the year 1896, these packing plants bought one-half of all the cattle sold at the yards and four-fifths of all the hogs (pp. 144, 174, 320, 321, 327, 353, 394, 399, 434, 451). Moreover, the increase in the business of the yards has been most pronounced since the establishment of these packing plants (p. 399).

This expenditure on the part of the stock-yards company has undoubtedly created the market more than any other cause, and it has correspondingly benefited Kansas City and all the patrons of the yards. The results have demonstrated the wisdom and success of the policy. Is it not fair and just that this expenditure, as much for the benefit of the owners of live stock using the yards as of the owners of the yards themselves, shall be considered in determining the amount upon which the stock-yards company is entitled to a fair return? Of course, in any other transaction in life, this necessary outlay would at once be recognized as a legitimate capital expenditure and as having greatly increased the permanent value of the enterprise and property. It is submitted that it constitutes a fair element and a just equity in determining the values as between the public and the owners of stock-yards. There can be no reasonable doubt that as matter of law such expenditures out of the capital of a corporation are proper, particularly when shown to have resulted advantageously. Nor can it be doubted that the courts would treat such an investment of capital as property subject to taxation.

It would be a fair and just rule that, in considering what the patrons of the yards should rightly pay, a court of equity may allow for reasonable expenditures to bring to the yards

the buyers, without whose presence the market would be worthless to the owners of live stock. How strong is the equity when it appears that the fruits of this policy are to realize for the live stock owner more than he can procure at any other yard, and to benefit the class using the yards at least $1,500,000 per annum in better prices than are obtainable at other yards (p. 74). Counsel submit that it would be a most unjust result to allow the live stock owners to use the yards and profit by these expenditures, and yet to refuse to contribute anything towards the expense of the necessary outlay which has benefited them so materially.

It was also shown that the stock-yards company had on hand in its business some $400,000 in cash and credits (p. 76). This was entirely thrown out by the master. There should hardly be much need of arguing the proposition that such a concern must have a reasonable amount of working capital. It is called upon to advance freights to the railroads and otherwise constantly disburse funds. It is pressing the stock-yards owner altogether too far to say, and it would be grossly unjust to hold, that the cash working capital which he finds necessary to carry and have on hand for use in the business and the *accommodation of the patrons of the yard* is not to be considered as any part of the capital invested upon which some return is to be expected. What paralysis would seize the business if the stock-yards company were to refuse to advance freights, &c., and compel each owner of live stock to finance for himself.

The master excluded two parcels of land which should have been included in the lands used for stock-yards purposes. They are the tracts lettered (*d*), 8.028 acres, and (*e*), 12.122 acres, in the master's report (p. 75), and are

valued by him as respectively worth $41,140 and $85,000 or a total of $126,140. The land was acquired and is held for present and future stock-yards purposes, and is clearly a necessary part of the plant. As matter of fact, the two tracts are used for the dumping of manure and offal; and if not so used, other property would have to be bought or leased for that purpose (pp. 167, 169, 193, 246). Foster, D. J., refers, at page 872, to the omission of these parcels by the master and clearly intimates his view that they should have been included as a necessary part of the stock-yards plant, for he includes their value in his estimate. Under the evidence in the record, there should be no other reasonable or just conclusion than that these parcels should be added to the master's valuation.

5.

Summary.

We may now summarize the argument, so as to show the investment in the enterprise upon the master's basis of valuation and upon the basis of the fair present value for stock-yard purposes.

As to the master's basis of valuation:

1.	Master's valuation of stock-yards land as bare land without improvements	$3,600,626 00
2.	Omission of parcels used for dumping manure and offal	126,140 00
3.	Master's valuation of improvements *after deducting depreciation*	1,480,000 00
4.	Master's valuation of supplies, feed, &c	307,377 25
5.	Working capital, consisting of cash and credits	400,000 00
6.	Expenditure for packing plants	817,944 28
		$6,732,087 53

Upon this basis, if six per cent. be a reasonable interest, $403,925.25 would be required; yet, it appears that the statutory rates would only have produced net $176,322.71 after deducting the cost of the improvements or depreciа-

tion. This is about two and one-half per cent. upon the value of the investment estimated as above.

But if we take the fair present value of the land for stock-yards purposes, the result would be:

1.	Valuation of land for stock-yards purposes, at least..	$5,000,000 00
2.	Master's valuation of improvements	1,480,000 00
3.	Master's valuation of supplies, feed, &c	307,377 25
4.	Working capital, consisting of cash and credits,	400,000 00
5.	Expenditures for packing plants	817,944 28
		$8,005,321 53

Six per cent. upon this valuation would require $480,319.29, whilst the statutory rates would only produce $176,322.31, or about two per cent.

But if the valuation were governed by the fair value of the plant in its present condition as an entirety or unit of operation or by the market value of the stock, these figures could easily be increased to the minimum of the complainants' witnesses, namely, $9,000,000, which might be stated as follows:

1.	Valuation of land for stock-yards purposes as testified to by Mr. Morse and exceeded by many witnesses (p. 192)	$5,685,240 00
2.	Master's valuation of improvements	1,480,000 00
3.	Master's valuation of supplies, feed, &c	307,377 25
4.	Working capital, consisting of cash and credits	400,000 00
5.	Expenditure for packing plants	817,944 28
6.	Good-will on master's valuation (p. 78)	780,000 00
		$9,470,561 53

Six per cent. upon this basis would require $568,233.69, whilst the statutory rate would afford $176,322.31, or 1.8 per cent.

As Mr. Justice Brewer said in *Adams Express Co.* v. *Ohio*, 166 U. S. 185, 220:

> "What a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the

purposes of income and sale $16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale."

So in the case at bar, what a mockery it would be to hold that, although the market value of the stock has ranged always above par, and most of the time at a premium of from fifteen to forty per cent. for every purpose of income and sale in the markets, representing a value of $8,400,000 to $10,300,000, nevertheless, it must shrink to about 73 per cent. of par, or $5,388,003.25, the moment the state sees fit to interfere for the benefit of the class using the yards.[1]

These showings would be still worse if all the property which the stock-yards company owns were included. It is a hard rule which would deny it a return upon property which was purchased for probable use in the business and exclude it simply because it does not earn anything as yet. So also as to the horse and mule department.[2] Any reasonable and fair business man would at once recognize that accommodations for horses and mules are now necessary for any stock-yards, for farmers ship all kinds of live stock; yet because this department is not affected by the charges and produces little profit as yet on the actual investment, it was thrown out of consideration by the master and court below. This is as unfair as if the legislation had omitted to regulate the rate for sheep

[1] That this capital stock would be a just basis of valuation for taxation, see, also, *Ryan* v. *Commissioners of Leavenworth Co.*, 30 Kans. 185, 189; *Porter* v. *Rockford, Rock Island, &c., R. R. Co.*, 76 Ill. 561, 588.

[2] The Attorney-General insists upon deducting the cost of the horse and mule department (brief, p. 74), but in so doing inadvertently stated the figures incorrectly. On the eighth line of p. 74 there is a mistake in subtraction of $1,000,000, which error quite destroys the value of the figuring that follows.

or calves, and it were held then that the sheep or calf department should be disregarded if it did not produce much profit. Of course, this claim as to the horse and mule department would never have been hinted at if that branch of the business had shown a substantial profit.

It is, however, unnecessary to discuss all these items and details. The court will consider this important case on broad lines; and the appellants' position is too strong upon the main features to require any extended argument of incidental points. There will be just allowances for what should be considered as fair elements in determining the value of the property and the value of the service as between man and man. If the court shall conclude that in justice at least six per cent. interest or return under all the circumstances should be allowed as the right of the property owner—and the Attorney-General seems to concede this—and shall be satisfied that either the cost of the improvements or a proper allowance for depreciation should be deducted from income, there will be no difficulty in deciding as matter of fact that the return is much less than three per cent. in any aspect, and as a matter of law that this act of the legislature of Kansas imposes unreasonable charges on the owners of stock-yards property, and is in violation of those property rights which the Fourteenth Amendment protects.

V.

THE VALUE IN THEMSELVES OF THE SERVICES RENDERED AND THE REASONABLENESS OF THE CUSTOMARY CHARGE COLLECTED BY THE STOCK-YARDS COMPANY.

The element of the value in themselves of the services rendered was entirely disregarded in the court below, and it was apparently assumed that the only basis of computation should be the value of the property used by the public.

In neither the master's report nor in the opinions delivered by Foster, D. J., and Thayer, C. J., will there be found any discussion or finding as to the value of the service rendered to the owners or shippers of cattle and other live stock. All that the master finds is that the charges are substantially the same as those collected in other yards, and that the price realized by live stock owners at Kansas City is far in excess of the prices obtainable in the Chicago market. Yet it is now perfectly well settled that the fair value in themselves of the services rendered to the public must be taken into consideration in determining judicially the reasonableness of the charges made. *San Diego Land Company* v. *National City*, 174 U. S. 739, 757.

The failure below to give any weight or to devote any attention to the value in themselves to the patrons of the yard of the services rendered was due to the idea that this element was not material, or, at any rate, was to a greater or less extent precluded by the legislation, if the results of the rates prescribed were not *confiscatory*. This, it will be noticed, is the case in the brief now filed on behalf of the Attorney-General. Apparently, it is assumed that the value in themselves of the services is not open to investigation, if the legislative rates would produce a *reasonable* interest upon the value of the investment, although this is more favorable to the stock-yards than the view of the court below. Indeed, it is asserted by the Attorney-General that the stock-yards company could have heretofore legally collected extortionate or unreasonable charges "in the absence of a statute to the contrary" (defendant's brief, p. 29).[1] This is not the law. The

[1] The language of the Attorney-General is (pp. 29, 34): "The dealers are compelled to patronize these yards and to pay prices which the company may see fit to charge for its services, in the absence of a statute to the contrary; consequently, the greater the extortion perpetrated at the

common law rule required such charges to be reasonable if the business were impressed with a public interest; and these statutes are only sustained because at common law this was the rule. The common law is in effect itself a regulation of reasonable charges (*Munn* v. *Illinois*, 94 U. S. 113, 134). It has never been held in any case that the legislative fiat could impress a business with a public interest if the public interest did not already exist. This error of view has been the cause of the disregard below of the element of the reasonableness in themselves of the charges made irrespective of the effect upon net earnings. It was contended that the evidence of customary charges in the past was immaterial and at first it was so ruled by the master (record, p. 107), probably because the theory was that, "in the absence of a statute to the contrary," stock-yards companies could charge what they saw fit. On the contrary, it should have been recognized that the common law regulating the charges in the past equally imposed the restriction that they should be reasonable. Hence, the evidence of the customary charge is of great weight —indeed, of almost controlling effect—if we bear the true rule in mind and reflect that this customary charge has been in effect for a quarter of a century, but the customary charge is of little weight if we adopt the view of the Attorney-General.

I.

Counsel for the appellants submit that the basis of compensation, in the majority of cases affecting private

yards the greater the income from its business, and the greater the market value of its capital stock. * * It is apparent that the market value of the capital stock of a corporation engaged in a competitive business, in which the earnings are more or less problematical, would naturally be more nearly equal to the value of the property owned by the corporation than *in the case of a corporation possessing an absolute power to compel whatever earnings it might see fit to make.*"

property, should be the reasonable value of the service actually rendered, and not the return upon the value of the particular plants; although, under either aspect, the statutory rates in the case at bar are unreasonable. This element of the value of the service itself, as a general rule, will be found to furnish the simplest and fairest standard, just alike to the public and to the property owner; and it will involve less difficulty and embarrassment to the courts than any other rule. The appellants also submit that the customary stock-yards charge ought to be presumably a reasonable charge in view of its long continuance and universal effect and of the settled rule at common law that such charges must be reasonable.

If, for example, the business of the Kansas City stock-yards were now about to be started for the first time, with a plant costing $5,000,000, without the adjoining packing houses, and with receipts of only 167,000 head of live stock, as in 1871, or only 1,979,000 head as in 1883, instead of 5,471,000 head as in 1896, and if the company had the prospect of many years of risk, labor, expenditure and waiting before a large or paying business at customary rates could possibly be established, would it not seem unreasonable for the company to charge fifty cents or one dollar a head upon cattle when all other yards charged twenty-five cents? Yet the excessive charge of one dollar might be necessary to pay even operating expenses. It would, however, be legally unreasonable and unjustifiable, because it would be excessive having regard to the market value of the service, determined in great measure by the fact that in all other stock-yards in the United States the charge was only twenty-five cents for exactly the same service under substantially similar conditions. The courts would say that those who in-

vested in such an enterprise would have to take the risk and loss consequent upon the delay necessary to build up a sufficient trade to make the enterprise fairly remunerative under reasonable and customary charges. They would say that the owner must now bear the loss because, if successful in establishing a large market and trade, he would reap a corresponding profit. That this would be the law ought to be self-evident.

Again, we may suppose that the business of the stock-yards company decreases one-half by reason of the establishment of competitive yards and packing houses in other localities perhaps better suited to meet changed business conditions. In such a case, the expenses of operation would continue the same, and it might be necessary for the stock-yards to double or treble its charge in order to create a fair return upon the reasonable value of the property. But surely the company could not, simply to make up the decrease in receipts, increase its charge above the customary charge of other yards and the reasonable value of the service.

The very large tract of land, more than 125 acres, now used by the company for stock-yards purposes, may in the future double or treble in value. The present value of the land, surrounded as it is by a great city becoming more and more populous, may increase manyfold. A fair return upon the increased value of the property might require a great increase in the charges. Would a court hold that, merely because the property had thus increased in value, the stock-yards company could increase the customary charge for the service rendered? The court would say, as was said in *Munn* v. *Illinois*, that, if the property became so valuable, the owner might "withdraw his grant by discontinuing the use; but, so long as he maintained the use,

he must submit" to the requirement of reasonable charges. A just decision would then be that the primary consideration was not what the owner of the stock-yards should earn on the present value of his investment, but rather the reasonableness in itself of the customary charge irrespective of the result upon net earnings. *Covington, &c., Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596.

All these considerations and risks must persuade the court that there are great equities in support of the contention of the appellants, that so long as the stock-yards company continues to make the customary charge, the public is not injured and the legislature cannot interfere.

As bearing upon the view that the true test should be the value of the service in itself, reference may be made to the language of Mr. Justice Bradley in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 699, viz.:

> "It is also obvious that since a wharf is property, and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant."[1]

And in *Canada Southern Railway Co.* v. *International Bridge Company*, 8 App. Cas. 723, 731, the English rule is vigorously expressed as follows by Lord Chancellor Selborne:

> "It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence

[1] Quoted with approval in *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444, 449.

that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their Lordships asked Counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and after manipulating the accounts in their own way, to ask a Court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned Judge in the Court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. Their Lordships can hardly characterize that argument as anything less than preposterous."

2.

In seeking to determine the value in themselves of the services rendered in the case at bar to the owner of live stock using the yards for his convenience and profit, the first feature that stands out prominently in the record is that the yardage and attendance are free unless the live stock is actually sold. The owner of cattle, etc., therefore, has the privilege of using the yards without any charge unless he finds a buyer at a price satisfactory to himself. A large portion of the live stock is consigned to

Chicago or other yards, with privilege of sale in Kansas City (p. 69), for the very purpose of going elsewhere if not satisfied with the price obtainable. There is no compulsion as to the payment of yardage. The practical result is that the stock-yards company really guarantees a better market than elsewhere; and unless it continues to maintain its market as such, so that the prices are better than in other yards, fully one-half of the business will be at once diverted to Chicago or other points. The owner of live stock is also entitled to keep his cattle in the yards as long as he pleases, and until he finds a satisfactory market (p. 403). For this reason and for others shown in the testimony (p. 367), the company must provide accommodations for the maximum possible requirements, and if the market—that is, the buyers—fail them, they lose not merely the profit, *but the cost of operation and maintenance.* This consideration of free yardage was given no weight below; yet it does fairly bear upon the question as to the value of these yards to the owners of live stock and upon the claim that the customary charges are reasonable.

The second prominent feature is that the yards are kept in better condition and have more facilities than the yards at other points (p. 179), and that the owner of live stock consequently obtains better prices than elsewhere. These better prices are undoubtedly the result of the greater facilities and accommodation furnished and of the expenditure made by the company in inducing packing plants to locate in the immediate vicinity of the yards. It appeared and the master found that, during the test year selected by consent—namely, 1896—shippers realized more than $1,500,000 in excess of the prices they would have obtained if the live stock had been

forwarded to Chicago (pp. 74, 123); that is to say, *they had realized, in excess of the prices obtainable elsewhere, enough to pay for all yardage and feed collected by the Kansas City company, and had left over $646,000 besides.*

When we reflect that the market was built up from practically nothing to what it is to-day principally by the efforts, ability and investment of the stock-yards managers, it must be evident that the value of the service rendered to the live-stock owner is more than equal to the customary charge collected. At any rate, the court will not wholly disregard these two equities in analyzing the evidence, weighing the merits in this case, and adjudicating the fair value of the services actually rendered and the just compensation which the stock-yards owner is entitled to receive.

The mere furnishing of yardage and pens is the smallest part of the services rendered. The cattle are received by the stock-yards employees from the railways at the shutes, and the responsibility of the stock-yards company begins from that time and continues until delivery to the buyer. They drive the stock to the pens, which may be selected by the owner; and one carload may be distributed into twenty pens if the owner so desires in order to better exhibit his shipment. The live stock is fed and watered. The next step is to weigh each lot of stock and record the weights, all of which is done by stock-yards employees. The live stock is then delivered either to the packing houses or to the railroads according to the lots sold. The stock-yards company is compelled to have constantly on hand a large force of employees (some 346 men), many of whom are highly skilled in the business. The company is not only liable for accidents, but it practically guarantees all the records and weights,

and assumes responsibility for deliveries, &c. Indeed, everything that an owner of live stock would at any ordinary market have to do for himself is done for him by the clerks and yardmen of the company, so as to facilitate prompt and satisfactory sales. The detail of the business may be imagined from the example testified to by one of the witnesses, who showed an instance of the making of twenty-one separate entries, receipts, notices or documents as necessary in connection with the yardage of one lot of cattle. And for all these services rendered and benefits conferred, the cattle owner pays twenty-five cents as against an average selling price of forty dollars per head; in other words, about one-half of one per cent. of the price actually realized, and then only in case of sale (pp. 67, 109, 119, 157, 158, 384, 393, 402, 419, 426, 464, 465, 472).

The charge, moreover, is the customary rate at all other stock-yards. There is no agreement to maintain these rates, and they have existed for a quarter of a century at the other yards.[1] The evidence shows the utmost competition and strife for business between these yards, and the master so finds (p. 74). It must be evident that, if the customary charges had been or were excessive, the force of competition would have led to a reduction. The reason why the competition has not produced any reduction is that the charge in itself is low, and that it is infinitely more important to increase the

[1] It appeared that the stock-yards company prior to 1893 had charged twenty cents per head of cattle, or five cents less than the customary charge at other yards. The managers found that the lower charge was doing no particular good, and they deemed it wiser to increase the rate to the customary charge and expend the additional income in adding to their facilities and accommodations (pp. 143, 400). In any aspect, the fact that four years before the act in question they had charged twenty cents, or five cents less than the customary rate, cannot tend to establish that fifteen cents is reasonable. Since then nearly two million dollars have been spent on the property.

facilities and accommodations and to create a constant demand and stable market. The charge is so small and reasonable that in itself it would not affect the market. The facilities for trade, the demand, the proximity of packing houses, the soliciting and advertising, the accommodations furnished, the presence of buyers—these are the features that make a market, and not the yardage charge. If the stock-yards company must now reverse its policy, cease making improvements and developing its business, the market will, in very few years, go back to Chicago and other yards. It is in truth no exaggeration to assert that, if the company made no charge for yardage, the market, far from increasing, would, in fact, be destroyed if the facilities and accommodations now furnished were curtailed, and the packing plants which the stock-yards company helped to establish were to be removed.

It is submitted that the proof that the charge exacted by a private carrier or warehouseman or innkeeper or stock-yards is the customary rate during many years for similar services under like conditions, should establish the reasonableness of such charge as matter of law in the absence of all evidence to the contrary. The evidence of the customary charge has been recognized from time immemorial as a proper basis for determining this question. It is in all other relations the basis of judicial decision: the value of services or property is always established in court by proof of customary charges.[1] It is the safest basis in the long run, particularly when it appears that the result is a profit not at all above what other owners of industrial property receive upon their investments.

[1] *Kock* v. *Emmerling*, 22 How, 69; *Erben* v. *Lorillard*, 2 Keyes (N. Y.) 567, 572.

In *L. E. and St. L. R. R. Co.* v. *Wilson*, 119 Ind. 352, 358, the court said:

"The law makes it the duty of every common carrier to receive and carry all goods . . and authorizes a reasonable reward to be charged for the service. The amount to be paid is, in a measure, subject to the agreement of the parties; but when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, *which is to be ascertained by the amount commonly, or customarily, paid for other like services.*"

In *Hopper* v. *Chicago, etc., R. R. Co.*, 91 Iowa 639, it was held that evidence of charges by other companies for similar services might be admissible if the conditions were shown to be substantially the same. See, also, *Johnson* v. *Pensacola, etc., R. R. Co.*, 16 Florida 623.

Speaking of the duty of common carriers at common law, Bronson, J., in *Cole* v. *Goodwin*, 19 Wend. 251, 261, said:

"It is agreed by all the books that, while he enjoys the privileges of a common carrier, there are certain duties pertaining to that office which he cannot escape in any form. In the first place, he is bound to receive passengers and goods, if he have room, and carry them for a reasonable reward, *which may be set down as the accustomed reward for like services.*"

Chancellor Kent also said of carriers (2 Com. 599):

"As they hold themselves to the world as common carriers for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or *customary* price."

3.

Before the passage of the act of March 3, 1897, the legal right of the owner of stock-yards was clearly to receive a reasonable sum for any service rendered, notwithstanding the fact that the property had become impressed with a public interest. This right, whether we call it the liberty of the citizen or a property right, was of incalculable value. It

assured him, under the shield of the Federal Constitution,[1] the legitimate fruits of his labor and capital, and subjected him only to the risks of all commercial enterprises. He cannot be deprived of that right, nor can its beneficial enjoyment be substantially impaired by legislation, of which the only legitimate object should be the prescribing of reasonable charges. Whether or not we regard the legislative function as embracing the power to prescribe reasonable rates or to prevent unreasonable, extortionate and arbitrary charges—whatever language we employ—the substance of the right of the citizen must remain inviolable and protected against impairment. That is the essence of the American system of constitutional guaranties.

The matter in controversy is the reasonableness of the charge fixed by the legislature; and the controversy is to be determined after judicial investigation, "under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy."

A mere legislative enactment, in such a case as we are considering, cannot make that reasonable which without the enactment would not be deemed reasonable according to the ordinary rules of courts of justice. This court has not intended to formulate any rule which would give such a weight to a legislative enactment as would, by way of presumption or otherwise, substantially impair the personal liberty or property rights of the citizen. If the charge of the owner of a stock-yards or warehouse or ele-

[1] It is interesting to note that there is no provision of the Kansas constitution which expressly protects the liberty or property of citizens from impairment or encroachment. There is no provision requiring due process of law, found in almost every other state constitution. The Fourteenth Amendment alone seems to afford protection in that state against arbitrary or confiscatory legislation.

vator is reasonable, having due regard to the market value of the service rendered and the customary charge elsewhere, it cannot be made presumptively unreasonable simply because the legislature, acting on behalf of the class using the property and for the benefit of that class, has seen fit to reduce the charge nearly one-half. The power to prescribe what shall *prima facie* be deemed a reasonable charge in such a case as is before the court may be within the domain of the legislative branch as a matter of evidence or court practice; but more than that is "without its operative effect," to borrow the phrase of *Munn* v. *Illinois*. Neither the owner of cattle nor the proprietor of a stock-yard or cattle exchange is concluded, or his rights materially affected or impaired, by a mere legislative enactment.[1] Otherwise, a matter properly of judicial cognizance would find itself practically prejudged and determined by the legislature, which would act both as legislator and as judge.

Let us consider the question in two practical aspects. The owner of the stock-yards, there being no legislation, sues to recover a charge of twenty-five cents per head of cattle. The defense under the common law is that the business is impressed with a public interest; that the customary charge is unreasonable, and that fifteen cents is enough. It is shown, as was shown in the case at bar, that twenty-five cents has been the rate of charge for many years; that it is the rate for similar services at all other stock-yards; that experts, familiar with the business and fully qualified, testify that the charge is reasonable and fair in view of the service rendered (pp. 465, 472);

[1] *Louisville & N. R. Co.* v. *Railroad Commission of Tennessee*, 19 Fed. Rep. 679, 695; see also discussion in *Vanhorne* v. *Dorrance*, 2 Dallas 304, 312; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327; *People* v. *Cannon*, 139 N. Y. 32, 43.

that an immense capital is invested and at hazard in the accommodations furnished; that a market and demand have been created at the cost and by the efforts of the owner of the stock-yards; that, by reason of these conditions and the artificial demand thereby created, the shipper realizes more than he would realize anywhere else; that the increased price thus obtained is very much more than sufficient to pay all charges for yardage and feeding; that no yardage is charged unless a satisfactory sale is made; that the owner of the stock-yards is responsible as insurer and renders many services in driving, taking care of the cattle, billing, guaranteeing numbers and weights, shipping, etc.; and that the whole charge for yardage and for the responsibility and labor in taking care of the cattle, including driving, putting in pens, transferring, facilitating advantageous sale, watering, weighing, guaranteeing, etc., was only about one-half of one per cent. of the price realized for the cattle. And, as here, no other evidence is offered. Would not any court of justice under such circumstances hold that the customary charge or market value obtaining for years at all yards was reasonable? The legislature, however, interferes; and, taking sides in the matter with the class using the yards, ordains a maximum rate of fifteen cents. The owner of the stock-yards challenges the reasonableness of the rate prescribed by the legislature, brings his rights before a court of justice for determination, and produces exactly the same evidence which was conclusive in his favor when establishing the reasonableness of his charge unaffected by the attempted legislative interference or regulation. And, again, as here, no evidence is adduced to the contrary. Is it the law that, although the testimony would be ample and conclusive according to ordinary rules of evidence to

establish the reasonableness of the charge in the case first stated, it is not sufficient to establish exactly the same *fact* or *conclusion* in the second case? If so, it is because of a legislative enactment. Does the legislative fiat then change the nature of the question? Does the subject matter of the controversy become essentially different? If the charge for a service rendered is judicially reasonable under one aspect, does it become unreasonable presumptively because so decreed by a legislature? In a word, is not reasonableness to be determined in both aspects by the same evidence and the same rules which, as Mr. Justice Blatchford said in the Minnesota case, have been provided by "the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy"?

Let us also assume, for it will serve to point this branch of the argument, that the legislature, instead of reducing the customary charges, had doubled them, and that the farmer, shipper or cattle owner in Kansas or elsewhere was protesting against this enactment, and challenging in a court of justice the right of the legislature to impose, or of the owner of the stock-yards to collect an unreasonable charge. Whatever motive or inducement might have led the legislature to this act of regulation or generosity, would not the shipper or cattle owner be still entitled to say that no legislature could grant to private individuals, so circumstanced, the right to exact more than a reasonable charge for the service rendered? Could he not successfully invoke the protection of the courts against the taking away of what was previously his legal right, namely, to use the yards for the reasonable or customary charge? Would not the cattle owner most truly and forcibly argue that, if the legislature could give to a private warehouse or elevator or stock-yards company the right to exact unreason-

able and extortionate charges for private benefit, it would be neither more nor less in substance than holding that the legislature could grant to a private individual or corporation the right to impose an extortionate charge on the public for private benefit; and that the essence of such a power would be tyranny? The cattle owner would show that, during many years, twenty-five cents had been the usual and customary charge at Kansas City and all other points for a similar service, and that this was the market value of the use—that it was the fair value in itself of the yardage and attendant services, and would prove this by ordinary evidence, such as stated above. Can it be doubted that this court would hold that the legislative rate of double the customary charge or market value was unreasonable in the absence of sufficient grounds for the increase, in the absence of any public benefit or consideration? Is it to be conceived as possible that it would be held in such a case that the citizen was not entitled to relief from this arbitrary exercise of legislative power unless he could show more than we have stated, and overcome the strongest possible presumption in favor of the validity of the legislation or show that it was confiscatory or palpably a flagrant abuse of power? Would the court say that the burden of proof was such that the citizen was not entitled to relief unless he could show more than the facts we have mentioned? If this question ever comes before the court, and it is not improbable that it will, we may confidently assert that it will be held that no legislature can confer upon the owner of a stock-yard or warehouse or other private business the right to make more than a reasonable charge for the service rendered, and that at most the legislation merely created a *prima facie* excuse or warrant for what would otherwise be considered an extortion.

No rule of presumption would operate against the citizen. No burden of proof would bear him under, or deprive him of relief. His legal position and right would be substantially the same as if there had been no enactment, and the owner of the stock-yards had sought, without the support or cover or pretense of an arbitrary act of the legislature, to extort an unreasonable charge.

If, as may well be the rule, there is a strong legal presumption in support of legislation with respect to tax laws from considerations of a wise public policy, and with respect to railroad rates also because of public policy, and likewise because of the reserved power to regulate, nevertheless, the true rule in the case at bar must be that there is no such presumption and that the property owner comes into court free to establish the justice of the issue according to ordinary rules of procedure; that in so doing his legal rights remain unimpaired and unprejudiced by legislative fiat; and that he is to establish the truth of his claim by the same substantive evidence as he would without legislative regulation. The province and prerogative of the judiciary remain unchanged. We may well concede that the legislative rates are to be treated as *prima facie* reasonable as a rule of evidence requiring some testimony to overcome, but we submit that they have no more force; the enactment does not change or shift the burden of proof. Every lawyer knows that this *prima facie* effect is practically of great value; it compels the property owner to produce evidence in the first place, which is examined and scrutinized under the scorching test of adversary litigation; it forces him to prove the market value of the service and to show that his charges are the customary rates, or, if more than the customary rates, the facts which justify the excess. But if the stock-yards owner does pro-

duce such testimony tending to establish the reasonableness of the charge, and there is nothing in opposition but the legislative enactment, then he is entitled to judgment. Otherwise, the bare enactment places him at a material and prejudicial disadvantage, which in most cases would turn the protection of the Constitution of the United States into a mere mockery. In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, Mr. Justice Brewer said:

> "Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. *The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates.*"

In *Smyth* v. *Ames*, 169 U. S. 466, 527, Mr. Justice Harlan said:

> "The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

In *Chicago, etc., Railway Co.* v. *Minnesota*, 134 U. S. 418, 458, Mr. Justice Blatchford said:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investi-

gation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation take place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

The primary function of all government is the protection of the property and of the personal rights and liberties of the individual. Governments are created for that fundamental purpose. If there is a presumption, it is always, under the American system, in favor of the individual and of liberty of action. Indeed, when a court finds that the legislature for the first time seeks to regulate a business under the exercise of the so-called police power, and to radically reduce *customary* charges, it ought to be made to appear that the legislation is justified by some necessity, and that the extent of the interference with private business is reasonably necessary to prevent extortionate or unjust charges. We appreciate the disinclination of the courts to interfere with the legislative branch. Yet we must also recognize that the legislature should not be permitted to encroach, however slightly, upon the legitimate functions and prerogatives of the judicial branch. There is far more danger that the legislature will encroach upon the judicial branch than there is that the judiciary will ever encroach upon the legislative branch. As Webster so well said:

"It cannot be denied, that one great object of written constitutions is to keep the departments of government as distinct as possible; and for this purpose to impose restraints designed to have that effect. And it is equally true, that there is no department on which it is more necessary to impose restraints than

the legislature. The tendency of things is almost always to augment the power of that department in its relations to the judiciary." [1]

The most vital principle in the creation of our system of constitutional governments is the maintenance of clear lines of separation between the legislative and judicial branches; and the strict adherence to this separation of the different branches is the essence of a republican form of government.

The constitution of Kansas and the fundamental principle of our system of republican government vest the legislative power and functions in the legislature and the judicial power and functions in the courts. We know how anxious this court ever is not to encroach upon the legislative branch; but we also know that any encroachment upon the judicial branch, however slight, will be checked by that tribunal to which, above all others, is entrusted the duty of preserving constitutional government. If this class of legislation is to be construed as establishing more than *prima facie* evidence of reasonableness and as creating a presumption, more or less effective and binding upon the courts, and a heavier burden of proof than was previously required, then it is an interference with the judicial function in a matter which this court has declared is essentially for judicial investigation. It is true that every presumption should favor the constitutionality of an act of the legislature when we are dealing with the taxing power and other governmental functions, which in their nature and from sound grounds of public policy should be subject to revision or interference by the judiciary only in clear cases of abuse of power. It may be so in the regulation of tolls of public corporations. But it should

[1] Webster in "Independence of the Judiciary," Little, Brown & Co's. edition of works, vol. 3, p. 29; Ford's "Federalist," No. 49, pp. 334 *et seq.*

not be so in the case at bar. Above all constitutions, as well as prior to all constitutions, are the individual rights of liberty and property, which have never been parted with—those "equal and inalienable natural rights" which the constitution of Kansas declares are retained by the people, which the Fourteenth Amendment sought to protect against the assaults of temporary majorities, and in the support and defense of which it is the duty of the judiciary to be jealous against encroachment.

In the ever-to-be-remembered oration in the *Dartmouth College Case*, Webster said (4 Wheat. 518, 579, 581, 582):

> "If the constitution be not altogether waste paper, it has restrained the power of the legislature in these particulars. If it has any meaning, it is, that the legislature shall pass no act directly and manifestly impairing private property, and private privileges. It shall not judge, by *act*. It shall not decide, by *act*. It shall not deprive, by *act*. But it shall leave all these things to be tried and adjudged by the law of the land. . . Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. . . Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country."

VI.

THE ACT OF MARCH 3, 1897, HAS NO EXTRA-TERRITORIAL EFFECT AND DOES NOT APPLY TO THE FEED BUSINESS OF THE STOCK-YARDS COMPANY.

The predecessor of the present Attorney-General of Kansas contended below that the legislature of Kansas might properly regulate the yardage and feeding charges of the defendant company in Missouri because it was a Kansas corporation, and that position was taken in the

answer (p. 898). Attorney-General Boyle clearly intended to enforce the law as having an extra-territorial scope and effect and as applying to interstate commerce. The concession made by the present Attorney-General (brief, p. 19), that "there is nothing in the act which indicates any intention that it shall operate outside of the state,"[1] would seem to remove that feature from the case, for the court will not further consider, in view of this admission, whether the act has any force or effect in Missouri. The point that the act has no extra-territorial effect is discussed in the appellants' principal brief. The case, however, may be properly argued on both sides as if all the yardage and feeding were in Kansas, for that is the simplest way to test the general effect and result of these legislative rates. In other words, we may say, if Missouri and Congress should similarly regulate, what would be the effect on the whole business?

Although all the feed is ordered, sold and paid for in Missouri (record, pp. 65, 119), and, therefore, concededly beyond the scope of the act, it will be proper to consider briefly the effect of such legislation upon this branch of the business.

The feed was sold in 1896 at a price which was more than 100 per cent. in advance of the market price of the day before; and it is plausible to argue that an allowance of 100 per cent. above the market price ought to be reasonable. When, however, the nature of the business and the service rendered are analyzed, it will be evident that even 100 per cent. might not pay for the *cost* of the

[1] On the same page, it is added: "The question as to the extent to which the law may operate territorially is not involved in these actions. The issue in regard thereto is not framed in the pleadings, and the appellants are in error in claiming that we are urging that the law should have extra-territorial force."

service, and the figures submitted in the principal brie show that it would not.

The average amount of hay fed to cattle is 5 pound per head, for which the charge is 5 cents, and thi covers not only the hay itself but the service of feedin spreading on the floor, &c., &c.; the average charge pe hog is 1½ cents, and the average charge for sheep is les than ½ of one cent per head (pp. 110, 113, 120, 367, 36 387). The charge for each animal fed is obviously excee ingly low. The main cost of the service is, of course, i the labor, for there will be 20 deliveries to one ton hay (p. 142), and it will be fed to 400 cattle. Thus, if w take a ton of hay as a basis, we find that it is bough in large quantities and of the best quality and cost about $9 a ton including necessary insurance. It is sold fo $20 a ton, no matter what it costs, although the company ha had to pay as high as $15 and $24 a ton (p. 143). It i difficult to determine the cost of the labor of deliverin and feeding. It probably costs the stock-yards compan more than any other service rendered. It certainly cost at least 40 per cent. of the gross price realized. If w allow to this department its fair share of depreciation improvements and cost of barns, wagons, &c., the cost labor and maintenance is fully 52.51 per cent. There fore, the ton, which is retailed in 20 separate lots an fed to an average of 400 cattle per ton, realizes $20, mad up as follows:

(*a*) Cost at wholesale and insurance fully.....$9 00
(*b*) Labor at least 40 per cent. or..... 8 00
(*c*) Leaving a profit of less than 20 per cent. or..... 3 00
———$20

to cover the cost of maintenance and the fair proportio which this department should bear of the investmen which would be more than this nominal profit.

But, if we charge against the feed department its fair share of the cost of operation, maintenance and depreciation—namely, 52.51 per cent. of gross receipts—we shall have the result as follows:

(*a*) Cost at wholesale and insurance	$9 00
(*b*) Labor, etc., 52.51 per cent	10 50
(*c*) Leaving the profit per ton, for feeding 400 cattle, only	50
	$20 00

What would a court say of a statute regulating the charges of an innkeeper if it attempted to prescribe that all food should be sold at not to exceed one hundred per cent. over the market value at wholesale? It would sound fair and plausible: one hundred per cent. above *cost!* Yet it might be ruinous. It might represent no profit whatever. It would be shown that eggs, potatoes, fruits and meats are all bought at wholesale and sold for many times their original cost. Thus, eggs that may cost twelve cents a dozen at wholesale might be served by the innkeeper at five cents apiece—an increase of 400 per cent. over cost; but it would at once be recognized that this was not profit, and that labor and cost of operation, maintenance, rent, etc., probably showed little or no profit on the eggs. We are not here to ask a *profit* of 100 per cent. above cost. Far from it. The legislation is that no matter what the *cost* may be—original cost and cost of insurance, maintenance of barns, &c., labor in keeping and delivery and feeding—the price shall be arbitrarily fixed at 100 per cent. above the market of the day preceding.

The Attorney-General now contends that the statute means to limit the increase to 100 per cent. above the *retail* price (brief, p. 22); but the retail price in such small lots as five cents worth or even one dollar's worth of hay

was not shown, and could not be shown, as the court wi
readily perceive by referring to the testimony adduced o
behalf of the defendant. Of course, there is no such reta
business in the small lots referred to except in stables an
cattle yards. Had some witness engaged in the busines
of feeding cattle or other live stock been called, and it ha
been shown that he was qualified by knowledge, his test
mony might have been of aid; but none such testified.
man who buys at wholesale can readily sell by the to
at a profit of a dollar or two, provided he can sell i
bulk and does not have to deliver; but if he has to make fo
each ton 20 separate deliveries and feed 400 head of cattl
it would be unreasonable to expect him to sell a ton of ha
fo· even double the cost at wholesale for large lots. It
the universal experience in all businesses that the co
of labor greatly increases the retail price. The busines
of a stock-yards is essentially different from a feed sto
(pp. 120, 124, 141, 142). If, to repeat, the legislatio
gave the stock-yards 100 per cent., or 50 per cent., o
33⅓ per cent. clear profit on its feed, estimated fairly o
original cost and labor, an entirely different question woul
be presented. But it does not do so. It arbitrarily pr
scribes that no matter what the actual cost of th
hay and labor may be, and no matter what th
cost of the service of delivery and feeding, the charg
shall not exceed what other dealers not similarly situate
may sell for under essentially different conditions.

Three witnesses were called by Attorney-General Boyl
to prove the market value of feed; namely, Spellman, Fis
and Tyler (pp. 768, 770, 773). Spellman testified on cros
examination that there was no market price for such sma
lots as the stock-yards company sells, and that "each ma
makes his own price" (p. 77). Fish said that although h

would sell five cents' worth if requested, yet he "would not deliver such a small quantity as that," and that it would not pay "to send my wagon out with it" (pp. 772, 773). Tyler simply testified as a wholesale dealer, and not as a retailer, and the prices he quoted of $9 per ton for hay did not include delivery (p. 774).

Moreover, there is absolutely no compulsion about this feeding. There is no suggestion in the record that the feeding in cars is not just as convenient for those who object to the charges of the stock-yards company, and as humane to the live stock (pp. 397, 423); nor is there anything whatever to prevent any owner or his agent from driving his live stock outside the yards and feeding there and then returning to the yards (p. 423). There are plenty of stables in Kansas City. The reason why most of the live stock owners prefer to feed at the yards is undoubtedly because of the extremely reasonable charge per head of cattle, &c., made by the stock-yards company, and because they could not themselves or at any yard or stable in Kansas City obtain the same service for anything like the same low charge. Indeed, the testimony shows that the large buyers for the packing plants and others find it convenient and profitable to feed at the stock-yards until they need the live stock for slaughter or shipment.

The question of feed also presents a very serious question of constitutional law. Will the court extend the doctrine of *Munn* v. *Illinois*, 94 U. S. 113, so as to permit a legislature to discriminate among those engaged in the same business? The regulations in *Munn* v. *Illinois*, *Budd* v. *New York* and *Brass* v. *Stoeser*, applied to all alike. Can a legislature constitutionally regulate or limit the right of the owner of a stock-yards to sell hay and other feed and leave all other dealers free to obtain what they

may? Is this a legitimate classification? Is such a law as we are considering equal within the true meaning of the Fourteenth Amendment or of the requirement of the Kansas constitution that "all laws of a general nature shall have a uniform operation throughout the state"? Is it allowable that large dealers shall be regulated and all other dealers in the same commodity left free? If the court shall conclude, notwithstanding the admission of the Attorney-General, that it may in this case properly decide as to the nature and validity of this discriminating feature, then it is submitted that this part of the act must be declared unconstitutional, as a most objectionable piece of class legislation. But, in view of the statement of the Attorney-General that the act has no extra-territorial effect, it seems to counsel for the complainants unnecessary now to discuss this very interesting question further than will be found in the principal brief now on file.

The questions as to interstate commerce and as to how far this act may constitute a regulation of commerce are discussed in the principal brief on file. These questions are of far-reaching importance; and it were, perhaps, preferable that they should not be decided except after the most searching and discriminating investigation. The other issues in this record will consume all the time allotted under the rules for argument at the bar; and as the case can be decided on the merits upon the assumption that all the yardage and business were confined to Kansas, the question of interstate commerce may be reserved for some other case squarely presenting it for decision. Of course, if the court shall adopt this view, its opinion or mandate will so state in order that there be no possible prejudice to any interest.

CONCLUSION.

For the reasons set forth in the principal brief and in this reply, it is submitted that the act of March 3, 1897, of the legislature of Kansas should be declared void and of no effect on the ground that the rates prescribed are unreasonable and that the effect of the enactment would be to violate the rights of property protected by the Fourteenth Amendment, and the decree below should be reversed.

Washington, October Term, 1899.

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Of counsel for appellants.

APPENDIX.

The tables of the master are not correct and fail to accurately summarize the testimony. The following may therefore be of aid to the court. It is carefully based upon the testimony in the record, and starts from 1884, when the new corporation was organized with a capital stock of $1,990,000 issued for property worth at least that amount. These figures as to profits are taken because they are testified to by the Attorney-General's own expert accountant (pp. 742, 745).

Year.	Capital stock issued.	Profits.	Cash dividends paid.	Percentage of dividend paid.	Stock issued at par for additional cash actually paid in since 1884.	Stock dividends representing undistributed net profits invested and capitalized.	Stock dividends representing increased value of lands.	Stock issued at par to Armour & Co. instead of $500,000 for packing plant.
1884...	$1,990,000.00	.....	$119,391.00	6				
1885...	1,990,000.00	.....	149,250.00	7				
1886...	1,990,000.00	.....	119,400.00	6				
1887...	1,990,000.00	.....	150,600.00	7½	$535,000.00	$456,993.00	$1,058,067.00	
1888...	4,040,000.00	.....	282,800.00	7				
1889...	4,040,000.00	.....	323,200.00	8				
1890...	4,040,000.00	.....	323,200.00	8	9,000.00	404,000.00		
1891...	4,444,900.00	.....	311,143.00	7				
1892...	4,444,900.00	.....	370,592.00	8				
1893...	4,944,900.00	.....	296,694.00	6	55,100.00	.....	.....	$500,000.00
1894...	5,000,000.00	.....	451,133.50	9	1,667,100.00	268,100.00		
1895...	6,935,200.00	.....	554,816.00	8	.....	.....		
1896...	7,368,650.00	$486,227.15*	429,162.50	6	.....	433,450.00		
Total	.....	.....	$3,881,380.00	.....	$2,266,200.00	$1,562,543.00	$1,058,067.00	$500,000.00

* After deducting improvements, $69,584.65.

C. D. PARKER (p. 629 *et seq.*):

"Q. (p. 632). In placing the valuations on these tracts A, B, C, D, and E did you take into consideration the use to which this land is being put by the stockyards company?

A. No, sir; we took into consideration the prices of property adjacent to the stockyards, together with the surroundings.

Q. (p. 633). Where else in that vicinity could they find any such a body of land?

A. There is no such property, except west of the stockyards, that is available right near that point for such purposes. * *

Q. Suppose they went in there to condemn 25 acres and you sat on the jury—

A. It would not be practicable; it could not be done.

Q. (p. 634). They could not buy it for any price that would be within reason, could they?

A. No, sir.

Q. (p. 636). And if another stockyards company should come in, do you think it could procure as desirable a location in the bottoms?

A. I don't think it could.

Q. That being the case, Mr. Parker, am I right in concluding that in your judgment the present location of the Kansas City stockyards is peculiarly well adapted for their purposes?

A. With the surroundings; yes, sir.

Q. (p. 645). Now, state, if you can, what is the actual present value of the land for stockyards purposes.

A. I don't know, Mr. Hite."

E. F. ALLEN (pp. 657 *et seq.*):

"Q. (p. 666). In making your estimate of values you were not influenced by the value of the use to which the lands were being put by the company?

A. No, sir.

Q. Not at all

A. No, sir.

Q. (p. 670). Now, assume that the Kansas City Stock Yards people have been prosperous, would you say, Mr. Allen, that their proximity to the packing-houses and their proximity to the railroad terminals was an element of their prosperity?

A. Oh, yes; that enters into it.

Q. Is that such an element of prosperity as would be destroyed by the removal of the yards two miles from thei present location? I will not — destroyed, but impaired.

A. It would greatly impair it, I should judge.

Q. The fact is, to get the idea clearly, that the present location of the stockyards, everything considered, is one of the best that they could have?

A. Very attractive location, I would judge; of course, I am not familiar with their business.

Q. In a general way, that is true?

A. Yes, sir.

Q. Considering all the questions that you have been asked and the answers that you have made, what, in your opinion, is the value of this property that you valued to the stockyards company?

A. I don't know."

R. E. CABLE (pp. 678 *et seq.*):

"Q. (p. 683). What, in your opinion, is that tract E worth just as it stands today?

A. For general purposes or the purposes for which it is being used?

Q. For the purposes for which it is being used.

A. Certainly I could not answer that question.

Q. You do not know?

A. No, sir.

Q. I call your attention to the tract B. What is that worth as it stands there today for the purposes for which it is being used?

A. To the stockyards company?

Q. Yes.

BY MR. BOYLE: With all the improvements on it?

BY MR. HITE: Yes, sir; just as it stands today.

A. I certainly don't know.

Q. (p. 689). What do you mean by general purposes?

A. For drug stores, groceries, saloons, or any other business or for residences; any business you choose to consider.

Q. Wouldn't it be worth the prices we have been considering for packing-house purposes?

A. I couldn't answer.

Q. Wouldn't it be worth that for railroad purposes?

A. That I don't know.

Q. (p. 690). Do you know what the value of the stock-yards property is today as it stands?

A. The land, you mean?

Q. (p. 691). The real estate belonging to the stockyards company, just as it stands today.

A. No, sir; I have got my judgment on the value of the lands of the company. You mean the improvements, also?

Q. Just as I stated; just as you look at it today; do you know what is the value?

A. I don't; and no person living except the stockyards people can answer that question.

Q. Would they know?

A. Yes; what it was worth to them.

Q. Wouldn't they know better than anybody else what it was worth?

Objection as improper cross-examination. Objection sustained.

Q. Then, as I understand you, the value which you have put upon this property is the value it would possess if it were a farm located down there in the bottoms?

A. Certainly."

C. W. WHITEHEAD (pp. 692 *et seq.*):

"Q. (p. 696). What is this property marked A, B, C, D, and E worth for stock-yards purposes?

A. I don't know.

Q. What is the value of this property for railroad purposes?

A. I don't know.

Q. What is the value of this property for packing-house purposes?

A. I don't know anything about the packing-house business. * *

Q. What would be the value of that property for packing-house purposes?

A. I have stated, I believe, that I don't know.

Q. (p. 697). These pieces of land concerning which you have testified are valuable for stock-yards purposes, are they not?

A. Yes, sir.

Q. Is it not a fact, Mr. Whitehead, that they are more valuable for stock-yards purposes than for any other purpose?

A. They are at present; yes, sir.

Q. (p. 699). I am excluding from consideration that period. In placing the values which you have given upon these tracts of land, Mr. Whitehead, you have excluded entirely, have you not, the use to which that land is being put at the present time?

A. In arriving at our values we tried to get the values of the property that was not affected by any railroad extension or stock-yards extension.

Q. You excluded both?

A. Yes, sir."